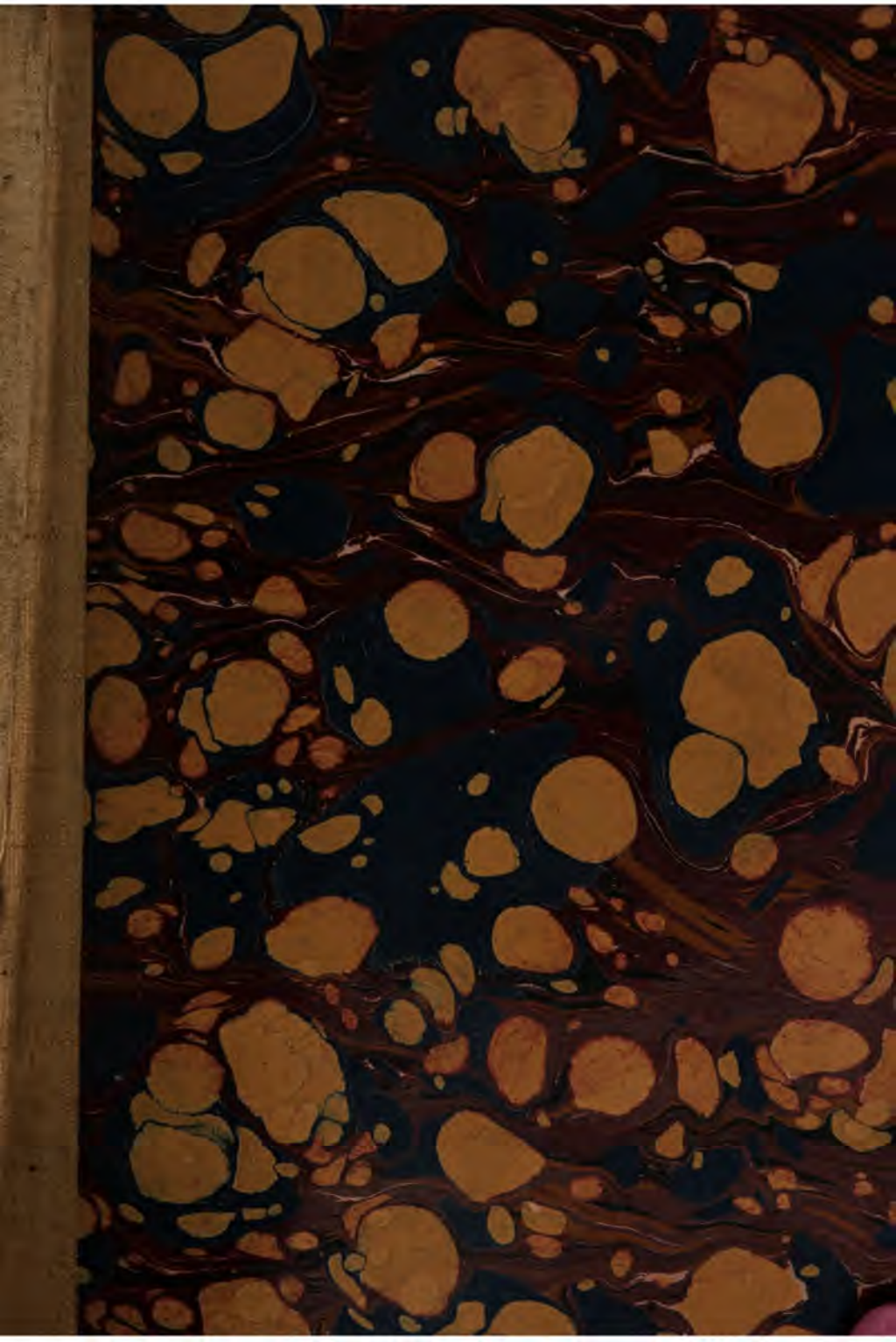

BANKERS' ADVANCES

ON

MERCANTILE SECURITIES

OTHER THAN BILLS OF EXCHANGE AND PROMISSORY NOTES.

BY

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PREFACE.

The present work is founded on a course of lectures delivered at the request of the Council before the Institute of Bankers in November and December, 1901. The course was limited to four lectures, each of which was delivered before the members of the Institute in London and also at Newcastle-on-Tyne, and published in the Journal of the Institute early in the present year.

It was originally intended to deal with the whole subject in four lectures, but it soon became evident that this could not be done. At the end of the earlier lectures various questions were asked by members of the Institute, many of the questions relating to matters of great practical importance to bankers, and a good deal of time was occupied in answering them. This method of putting questions by those who have a practical acquaintance with the difficulties that arise possesses several advantages. It enables the lecturer to explain points which he may have left somewhat obscure, and to enlarge on those which he may have treated in too summary a manner. It also increases the interest of the listener to realise that the legal principles discussed are not altogether "in the air," and that if he is in doubt as to what principle governs some particular transaction within his own experience, the lecturer will at least make an attempt to solve his difficulty ; and it is in applying legal principles, not in ascertaining them, that difficulties mainly arise.

On the other hand, this method necessarily takes the lecturer, whose time is limited, away from the course which he had mapped out for himself.

The result in the present instance was that very little time was left to deal with the important class of advances made on the ordinary Stock Exchange securities—scrip, share and stock certificates, and bonds—and in preparing this work for the press, some references to such advances have been taken from the fourth lecture as delivered, and the whole subject more fully treated in two additional lectures. This and other additions have nearly doubled the size of the work, which the author ventures to think contains information not hitherto collected in a single volume. He has endeavoured to elucidate certain points of very considerable difficulty upon which insufficient light seems to be thrown by the recognized text books—such as the important consequences of the distinction between delivery orders and warrants generally and in relation to bankruptcy; of that between estoppel and a cause of action; and the effect of certain decisions of the House of Lords relating to bankers' advances to stockbrokers and money dealers. It is hoped that by thus rendering the work more complete it will be found useful to all who are interested in advances made on mercantile securities other than bills of exchange and promissory notes—especially to bankers and stockbrokers, as well as to lawyers.

The author does not so far flatter himself as to suppose that he has altogether escaped falling into error, but he has spared no pains in his endeavour to make his statements accurate. In treating of legal matters, it is impossible to avoid the use of technical terms, but as he was primarily addressing an audience of laymen, he endeavoured to make his meaning clear by explaining those terms whenever it seemed to be desirable. He has made no attempt to collect a large number of authorities,

but has cited cases only to support or illustrate his propositions. Although the number of those referred to may, to the lay reader who regards footnotes as an eyesore, seem unnecessarily large and even useless, he may perhaps bear with them more patiently if he realises that to a lawyer a statement of law (unless of the most elementary description) made without reference to the authority supporting it is of no practical use, for it affords him no means of checking its accuracy. The practice of citing authorities for each proposition, although unfortunately it affords no guarantee for accuracy, undoubtedly tends to accuracy ; and accuracy of statement on matters of law is quite as important to the layman as to the lawyer. A simple treatise on a legal subject free from all disfiguring citations is apt to be as misleading to the one as it is useless to the other.

In the third Lecture, the case of *Farquharson v. King* was referred to (at page 55) as an illustration of estoppel operating against the owners of goods who had by their conduct enabled another to hold himself out as entitled to dispose of them. But after that Lecture had gone to press, the House of Lords reversed the decision of the Court of Appeal (as mentioned in in a note at the foot of page 153), and held that there was no estoppel in that case.

The author desires to express his indebtedness to his learned friend, Mr. Walter C. A. Ker, the joint-author of the admirable and well-known Commentary on the Sale of Goods Act, for the great assistance kindly rendered in discussing various points of difficulty arising in this work.

A. R. B.

7, Fig Tree Court,
The Temple.
1st November, 1902.

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BANKERS' ADVANCES

ON

MERCANTILE SECURITIES.

LECTURE I.

DEFINITIONS:—LAW MERCHANT, PLEDGE, HYPOTHECATION, LIEN, SECURITY, NEGOTIABLE INSTRUMENTS, CONTRACT OF AFFREIGHTMENT, BILLS OF LADING. THE BILLS OF LADING ACT, 1855. THE HARTER ACT.

Different view taken by Lawyers and by Commercial Men.

NO profound knowledge of the world is necessary to perceive that lawyers regard many transactions from an entirely different point of view from that taken by commercial men. These, in the lawyer's opinion, often incur great risk by reason of—I will not say their happy-go-lucky, but—their easy-going way of conducting affairs, and an apparent want of precision in expressing their meaning; while commercial men are apt to look on certain legal methods as quite unnecessary hindrances in their business, and lawyers themselves as somewhat over precise and unpractical persons.

There is little doubt that some truth underlies both of these views. It was once suggested by a learned Judge that when a customer's acceptance was presented for payment at his bank, the banker, in order to avoid the risk of forged indorsements, might defer payment until satisfied by inquiry and investigation that all the indorsements were genuine, but a criticism upon that

suggestion was made by Lord Macnaghten that a banker so very careful to avoid risk would soon have no risk to avoid.*

I venture to think that one reason for the wide difference between the view often taken by lawyers and that taken by commercial men is that, in the large majority of cases with which the latter have to deal, everything goes right. Documents, for example, on the security of which advances are made, are, as a general rule, genuine documents pledged by one who has authority to pledge them, and it is only in comparatively rare instances that the documents turn out to be forged, or pledged without authority. It is cases of the ordinary kind with which mercantile men are most familiar, and it is usually only in the comparatively rare cases where something goes wrong that the lawyer is consulted. He therefore becomes familiar with instances of fraud, and consequently from his mind the possibility of fraud is never entirely absent. "The practice of merchants," said Lord Justice Bowen,† "it is never superfluous to remark, is not based on the supposition "of possible frauds. The object of mercantile usages is to prevent "the risk of insolvency, not of fraud; and any one who attempts "to follow and understand the law merchant will soon find himself "lost if he begins by assuming that merchants conduct their busi- "ness on the basis of attempting to insure themselves against "fraudulent dealing. The contrary is the case. Credit, not dis- "trust, is the basis of commercial dealings; mercantile genius con- "sists principally in knowing whom to trust and with whom to "deal, and commercial intercourse and communication is no more "based on the supposition of fraud than it is on the supposition "of forgery."

With respect to giving credit, it is obviously impossible for a lawyer to be of any assistance in suggesting to mercantile men whom to trust and with whom to deal. The utmost he can do is to point out what form of security is recognised by the law as valid, so that if the person to whom credit is given or advances are made turns out to be less honest or less solvent than was expected the lender shall be protected to the extent of the value of the security.

Utility of Definitions.

In the present Lecture, I propose to make some general observations on the law relating to securities and advances, and, by way of clearing the ground, to enquire what is meant by certain expressions frequently employed in this connection; because in this as in other matters a good deal of confusion is caused by using words without carefully defining their meaning, and still

* In *Bank of England* v. *Vagliano* (1891), A. C., at 157.

† In *Sanders* v. *Maclean* (1883), 11 Q. B. D., at 343.

more by using the same word in different senses. We shall see how frequently this is done, and to what confusion it naturally leads. I shall attempt, therefore, to give a definition and some explanation of certain terms, and endeavour to illustrate their meaning, even at the risk of this appearing to be too elementary to convey much information to those of you who are already familiar with this branch of mercantile law.

Law Merchant.

First, let us see what is meant by the Law Merchant. In commercial cases coming before the Courts, frequent mention is made of the Law Merchant; it is mentioned in some of our very old, as well as in some of our late statutes—for instance, in several Statutes of Edward III, passed in 1353,* and also in the Bills of Exchange Act, 1882, which preserves, with respect to bills of exchange, promissory notes, and cheques, "the rules of common "law, *including the law merchant*, save in so far as they are in- "consistent with" that Act.†

The *Law Merchant*, or *custom of merchants*, as it is often called, is founded on the *lex mercatoria*, or general body of European usages in matters relative to commerce, and it applies to mercantile matters principles different from those which our common law ordinarily recognises, but which have in the course of time been gradually adopted by our law.‡

The rules of law, for example, relating to bills of exchange, contracts of affreightment, and marine insurance are derived from the law merchant. The negotiability of bills of exchange and promissory notes is entirely derived from that law. Formerly at common law the right to sue for a debt could not be assigned by one man to another, but if a bill of exchange were accepted for the debt, the law merchant enabled the creditor to assign his right to sue by indorsing the bill. We shall have occasion to notice other rules of the law merchant in the course of these lectures.

Pledge.

Let us next enquire what is meant by a pledge. A *pledge* is when goods, chattels, money, or negotiable instruments are delivered to another as a pawn, to be a security to the pledgee for the payment of a debt or performance of an obligation by the pledgor.§

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* 27 Edw. 3, St. 2, cc. 8, 19, 20. † *See* s. 97 (2.)

‡ *See* Stephens' Commentaries, 7th ed., Vol. I, 55; Blackstone's Commentaries, Vol. I, 75, and note.

§ *See* Robbins' Law of Mortgages, Vol. II, 1458 *et seq.*; and notes to *Coggs* v. *Bernard* (1703), 1 Smith's Leading Cases, 7th ed., 216 *et seq.*

It is a species of what the law calls *bailment*, by the pledgor or bailor to the bailee, and it is called indifferently a *pledge* or *pawn*. *Delivery* of the thing pledged is an essential element. Such delivery may be *actual* or *constructive*. The delivery of a bill of lading of goods at sea is a constructive delivery of the goods. Without delivery the pledgee obtains no right of property in the thing; and if he parts with the thing delivered he generally loses the benefit of his security. In this respect it differs from a *mortgage*; for in a mortgage transfer of possession is not essential.

The pledgee is said to have a *special property* only in the goods pledged to detain them for his security, the *general* property continuing in the pledgor. The pledgee is entitled to hold the goods until payment of the debt or performance of the obligation, and, upon failure of payment or performance at the proper time, to sell them; but until he does so, the pledgor may redeem them by payment or performance.

Hypothecation.

Hypothecation, in its proper sense, is where a ship, or her freight or cargo, or all three, are made liable for the payment of money borrowed by the master. It is of two kinds,—bottomry and respondentia.*

1. *Bottomry* is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship and freight, or the cargo, for the performance of his contract, the debt being lost in case of the non-arrival of the ship. The most important case of borrowing money on bottomry is where the master of a ship is at a foreign port, and finds it absolutely necessary to obtain money, and can only do so by executing an instrument of hypothecation.†

2. *Respondentia* is the hypothecation of the cargo or goods on board a ship as security for the repayment of a loan, the term bottomry being properly confined to hypothecation of the ship herself.‡

Hypothecation is also frequently used as a general term equivalent to a *charge*. In this use of the word, to hypothecate property is to charge it with, *i.e.*, make it security for, the payment of a

* Sweet's Law Dictionary, "Hypothecation." That Dictionary is an excellent work, of which frequent use has been made in giving these definitions. It contains not only accurate definitions of legal terms, but a careful and concise summary of our law in all its branches.

† Sweet's Law Dictionary, "Bottomry."

‡ *Ibid*, "Respondentia."

sum of money or the performance of an obligation, giving the person in whose favour it exists neither the right to the possession of the property, nor the right to sell it, but merely the right of realization by judicial process, in case of non-payment or non-performance at the proper time.*

Lien.

A *lien* is, generally speaking, a right to retain property until a debt due to the person retaining it has been satisfied. In the case of a simple lien there is no power of sale or disposition of the goods, whereas in the case of a pledge, as we have seen, the pledgee may sell upon the default of the pledgor.†

The general lien of bankers will be fully dealt with in a subsequent Lecture.

Security.

In the next place, let us see what is meant by "security."

A *security* is properly something which makes the enjoyment on enforcement of a right more secure or certain.‡

There are three kinds of security: 1. personal security; 2. security on property; 3. judicial security.

Judicial securities—judgments, charging orders, distringas notices, etc.—are outside our present enquiry.

1. **A personal security** consists in a promise or obligation by the debtor or another person, in addition to the original liability or obligation intended to be secured. Sometimes the security consists of an instrument which facilitates the enforcement of the original obligation or extends its duration, as in the case of a bond, bill of exchange, promissory note, etc., given by a debtor for an existing debt, the liability on such instruments being easy of proof.

The advantages of obtaining such securities as a bill of exchange or promissory note by rendering the amount of a debt certain, curtailing the evidence necessary to enforce payment, and affording the means of procuring ready money by discount, are familiar to all of us.

2. **A security on property** is where a right over property exists, by virtue of which the enforcement of a liability or

* Sweet's Law Dictionary, "Hypothecation."

† See *Donald* v. *Suckling* (1866), L.R. 1 Q.B. at 604.

‡ *See* Sweet's Law Dictionary, "Security."

promise is facilitated or made more certain. This is of two kinds: (*a*) active and (*b*) passive.

(*a*) An *active* security is where the creditor has the right of selling the property for the purpose of satisfying his claim, as in the case of a pledge or a mortgage with a power of sale.

(*b*) A *passive* security is where the creditor has the right of keeping the property until his claim is satisfied, but *not* of selling it; such as the *possessory lien* of a tailor to retain a customer's coat until he has been paid a reasonable sum for work done to it.

The important characteristic of a security on property is that, in the event of the debtor being bankrupt, absconding, or dying, the right can nevertheless be enforced by means of the property.

Securities on property are also either (i) specific, or (ii) floating.

(i) *A specific security* is where the creditor acquires a right over some particular property. Thus, the pledge of a bill of lading for an advance is a specific security, the pledgee acquiring certain rights to the goods represented by the bill of lading, but not any right to any other goods or property of the pledgor.

(ii) *A floating security* is a security on all property which shall come under a certain description *at the time when the rights of the parties have to be ascertained.* For instance, where a Company issues mortgage debentures charging its property for the time being, including stock-in-trade, book debts, etc., that is a floating security. The Company may sell its old and buy new stock-in-trade; it may receive book debts and create new ones, in such a way that, when the time comes for enforcing the security, *the property then subject to it* may be quite *different* from what it was when the security was given. As soon as proceedings are taken which necessitate an enforcement of the security (*e.g.*, if the company goes into liquidation), the security becomes *fixed*, and no further change is possible. The debenture holders will then get the benefit of their security, for though the original property of the company may have disappeared, they will be entitled to be paid out of its existing property in priority to the general creditors.*

So far, I have dealt with security in its *primary* sense, but it is perhaps more commonly used in a *secondary* sense to denote the *instrument* by which a security is created or evidenced, as when we speak of holding Government securities, or of depositing securities with a banker. In this wide sense the term securities is used to include not only negotiable instruments but documents of title of all kinds, though we frequently find it used in narrower senses according to the subject matter, as, for instance, sometimes to mean negotiable instruments only.

* *See* Re *Panama, etc., Mail Co.* (1870), L.R. 5 Ch. Ap. 318.

Negotiable Instruments.

Let us next consider what is meant by "negotiable instruments." Here, again, we are met by the difficulty that the expression is used in different senses—a restricted and a wider sense. The question, however, as to precisely what is meant when "negotiable instruments" are mentioned has such an important bearing on the subject of these Lectures, and the solution of difficult problems so often depends upon the true answer to be given to it, that I must ask your special attention to the consideration of it. Let us first, then, see what is a negotiable instrument in the *strict sense*.

An instrument is said to be *negotiable* when, by the custom of trade or by statute, it is transferable either by mere delivery or by indorsement and delivery, and when any person who has acquired it in good faith and for value can enforce the contract or right of property of which it is evidence against the person originally liable on it, although the person from whom he acquired it may have had a defective title or none at all.*

There are then *two main requisites* of a negotiable instrument in the strict sense:—

1. It must be transferable by mere delivery, or by indorsement and delivery (according to whether it is made payable to bearer, or to order) so that the property in it shall pass to the transferee free from any defect of title of the transferor or of any prior holder.

2. The holder must be able to sue on it in his own name.

If either of those requisites be wanting—if it be not transferable so as necessarily to confer a good title on the transferee, or if the holder cannot sue upon it—it is not strictly a negotiable instrument.†

Let me illustrate this by examples:

1. Suppose A. owes B. £500, and gives B. a written recognition of the debt—say, the common form of acknowledgment known as an I.O.U. Formerly, the debt evidenced by this document could not have been transferred to C. so as to enable C. in his own name to sue A.; for, as has been said, a debt was not assignable at common law; but by the Judicature Act of 1873 B. can now assign it to C. in writing so as to enable C. to sue A., *provided* written notice of the transfer is given to A.; but still any defence by A. which would have been good against B.—*e.g.* that the money was

* *See* 1 Smith's Leading Cases, 7th ed., Notes to *Miller* v. *Race* (1758), 538, 539; approved by Blackburn, J. in *Crouch* v. *Crédit Foncier* (1873), L.R. 8 Q.B. at 381-382.

† *Ibid.*

not really due from A. to B.—will be good against C., although C. may have given full value to B. An I.O.U. is only an acknowledgment of a debt, and is not a negotiable instrument.

2. Again, suppose A. owes B. £500, and makes and gives B. his promissory note payable to bearer. This document can of course be handed by B. to C. so as to enable C. in his own name to sue A., without special notice of the transfer having been given to A.* If C. is a holder in due course,† his action against A. is not liable to be defeated by any defect of B.'s title ‡—*e.g.* that the money was not really due from A. to B.,§ or that B. obtained the note from A. by fraud;‖ for a promissory note is in the strict sense a negotiable instrument.

The following are negotiable instruments within this definition: bills of exchange, promissory notes (including bank notes), cheques, Exchequer Bills, East India bonds, dividend warrants, and some (though not all) scrip and bonds.

Now, if cheques are properly classed among negotiable instruments what is meant by a *cheque* crossed *not negotiable?* You are all aware of the *effect* which has been given to such a crossing by recent statutes, namely:—that a person taking such a cheque "shall not have and shall not be capable of giving a better title "than that which the person from whom he took it had."¶ In other words, he takes it subject to any defect of title of prior holders. If it has been stolen, no subsequent holder can get a good title to it. It fails, therefore, in one of the requisites of a negotiable instrument, but in other respects it is negotiable. It can be transferred, if payable to bearer, by mere delivery, and, if payable to order, by indorsement and delivery, and the holder can sue the drawer. But the latter, if sued, can raise by way of defence that the holder obtained it from a person who had no title to it. Its negotiable quality is therefore limited.

Here then we have an example of an instrument which in the strict sense is not negotiable, but which belongs to a class—*i.e.* cheques—which are, generally speaking, in the strict sense negotiable. And we shall find that a number of instruments—such as bills of lading—are frequently spoken of as negotiable, although they fail in one of the requisites of a negotiable instrument in

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* *See* Bills of Exchange Act, 1882, ss. 89 (1); 31 (1), (2); 38 (1).

† *I.e.* if he became holder of it in good faith and for value before it was overdue, and without notice that it had been previously dishonoured, or that there was any defect in B.'s title: *See* S. 29 of the same Act.

‡ S. 38 (2), (3). § S. 28 (2).

‖ *Cf. Watson* v. *Russell* (1862), 3 Best & Smith's Rep. 34; Illustration 5 to S. 29 (1) in Chalmers' Bills of Exchange Act, 1882, 5th ed. 89.

¶ Bills of Exchange Act, 1882, S. 81.

the strict sense. In any case where the question becomes of importance to ascertain whether an instrument is or is not negotiable, it is therefore necessary first to decide in which of the two senses "negotiable" is used—whether in the *strict sense*, where it is transferable by delivery, or indorsement and delivery, so as to confer an absolutely good title on every transferee who takes it in good faith and without notice of any defect, and where he can sue upon it in his own name; or, on the other hand, in a *wider sense*, where, for example, although it may be transferable by delivery, or by indorsement and delivery, and although the holder may be able to sue on it in his own name, the transferee will not necessarily get an absolutely good title, but the property will pass to him subject to any defect of title of his transferor or of any prior holder. Instruments of the latter class are more correctly described as *quasi-negotiable*. In dealing with particular instruments, I propose, as we come to them, to draw your attention to whether they are or are not in either sense negotiable.

Contract of Affreightment.

Let us now see what is meant by *a contract of affreightment*, and certain terms used in connection with that contract. The following explanation of these terms is given by Mr. Scrutton in his excellent work on the Contract of Affreightment as expressed in Charterparties and Bills of Lading:*—

"When a shipowner . . . agrees to carry goods by water, "or to furnish a ship for the purpose of so carrying goods, in "return for a sum of money to be paid to him, such a contract is "called *a contract of affreightment*, and the sum to be paid is "called *freight*.

"When the agreement is to carry a *complete cargo* of goods, or "to furnish a ship for that purpose, the contract of affreightment "is almost always contained in a document called a *charterparty*, "the shipowner letting the ship for the purpose of carrying, or "undertaking to carry, the *charterer* hiring the ship for such pur-"pose, or undertaking to provide a full cargo. Such a document "is usually signed before any steps are taken under the contract "it contains.

"When the agreement is to carry goods which form only *part* of "the intended cargo of the ship, the contract of affreightment as "to each parcel of goods shipped is evidenced in a document called "a *bill of lading*, which serves also as a receipt by the shipowner, "acknowledging that the goods have been delivered to him for a "certain purpose. A bill of lading is rarely signed until some "steps have been taken in pursuance of the contract it evidences."

* 4th ed. pp. 1-2.

Bills of Lading.

Lord Blackburn—the greatest judicial authority of our time on commercial law—in his book on the Contract of Sale* thus defines a bill of lading:—

"A *bill of lading* is a writing signed on behalf of the owner of "the ship in which goods are embarked, acknowledging the receipt "of the goods, and undertaking to deliver them at the end of the "voyage (subject to such conditions as may be mentioned in the "bill of lading). The bill of lading is sometimes an undertaking "to deliver the goods to the shipper by name, or his assigns, "sometimes to order or assigns, not naming any person, which is "apparently the same thing, and sometimes to a consignee by "name, or assigns, but in all its usual forms it contains the word "assigns."

The form of a bill of lading was in times past shorter than the forms now commonly used, as will be seen by the following quaint example of a bill of lading of the 18th century:—

"Shipped by the grace of God in good order and well conditioned "by James Robinson in and upon the good ship called the Mary "Borough, whereof is master under God for this present voyage, "Captain David Morton, and now riding at anchor at the Barr of "Senegal, and by God's grace bound for Georgey, South Carolina, "to say twenty-four prime slaves, six prime women slaves, being "marked and numbered as in the margin, and are to be delivered "in the like good order, and well conditioned, at the aforesaid port "of Georgey (the danger of the seas and mortality only excepted) "and so God send the good ship to her desired port in safety.— "Amen.—(Signed) D. Morton."†

A bill of lading of the present day usually contains the following exceptions: "the act of God, the King's enemies, fire, and all and "every other dangers, and accidents of the seas, rivers, and navi- "gation of whatever nature and kind soever excepted"; and, in the case of steamships, "fire, machinery, boiler, steam and all "other dangers and accidents of steam nagivation" are also excepted.‡

It also commonly undertakes to deliver the goods to a person named or to his assigns "he or they paying freight," and contains an agreement as to the adjustment of general average.

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* 1st ed. 275; 2nd ed. 388-389.

† Scrutton on Charterparties and Bills of Lading, 4th ed. Preface, pp. ix-x.

‡ See a common form of a bill of lading given in Appendix to Anson on Contract, 9th ed. 377. More elaborate forms will be found in Appendix I to Mr. Scrutton's work, 4th ed. 326-328.

General average arises where loss is caused intentionally in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, in order to avoid a common danger—as by cutting away masts or throwing cargo overboard—and means the *apportionment* of such loss among all the parties interested in ship or cargo in proportion to their interest.* A very common clause is: "General Average payable according to "York-Antwerp Rules, 1890." This refers to a code of rules settled and adopted by a series of International conferences, including one at York in 1864, one at Antwerp in 1877, and one at Liverpool in 1890.†

In some cases a bill of lading contains a clause: "freight and "all other conditions as *per* charterparty," and such a clause will incorporate in the bill of lading all such conditions in the charterparty to be performed by the consignee as are applicable to and consistent with the character of the bill of lading. Such a clause renders it unsafe to advance money on the security of the bill of lading without seeing what may be the liabilities under the charterparty; for the holder of a bill of lading may be made liable under such a clause, before he can obtain the goods, to pay charterparty demurrage at the port of loading or of discharge, even though he may be prevented from discharging his goods by the delay of other consignees.‡ The assignee is held to be bound to look to the terms of the charterparty, which are incorporated in the bill of lading, and to perform them so far as they apply to the goods; and, therefore, where according to those terms the goods are deliverable on payment of demurrage, if the assignee fails to pay demurrage, he is not entitled to the goods; or, if they have already been delivered to him, the law implies a promise on his part that he will do all that the bill of lading says shall be done, *e.g.*, pay any demurrage due;§ unless, indeed, the goods have been delivered to him *after* he has expressly denied his liability to pay demurrage and declined to pay it—in which case no such promise can be implied.‖

"By inveterate practice among most of the commercial nations "of Europe, bills of lading have long been drawn by the ship-"owner in sets of three or more";¶ and a modern bill of lading

* See Scrutton, *ibid.* 215–216; and Anson on Contract, 9th ed. 377. note 2.

† Scrutton on Charterparties, etc., 4th ed. 226, note (m). The rules themselves will be found in Appendix IV, *ibid*, 361–365.

‡ *See Porteus* v. *Watney* (1878), C.A. 3 Q.B.D. 534.

§ *Wegener* v. *Smith* (1854), 15 Common Bench Rep. 285. *Chappel* v. *Comfort* (1861), 10 Common Bench Rep. New Series, at 808, 809, 811.

‖ *County of Lancaster S.S.* v. *Sharp* (1889), 24 Q.B.D.

¶ *Per* Bowen, L.J., in *Sanders* v. *Maclean* (1883), 11 Q.B.D. at 341.

usually ends with the following clause: "In witness whereof, the "master of the said ship hath affirmed to three bills of lading, all "of this tenor and date, one of which bills being accomplished, the "others to stand void." Then follow the date and signature, and frequently the words: "Weight, quality, quantity and contents "unknown."

"The bill of lading is, therefore," again to quote Lord Blackburn,* "a written contract, between those who are expressed to be "parties to it, on behalf of their principals if they be agents, that "is, generally speaking, between the master of the ship on behalf "of . . . the shipowners on the one part, and the . . . "shipper of the goods on behalf of . . . his principal on the "other part, by which it is agreed that the shipowner is to deliver "the goods to the person who shall fill the character of assign.

"The assignment of the bill of lading *designates that person;* "and the master, by delivering the goods to him, fulfils the con-"tract, and by refusing to deliver them to him, he breaks the "contract; but (prior to the Bills of Lading Act of 1855) the assign "of the bill of lading was not made a party to the contract with the "master, nor could he, as assign, maintain *in his own name,* any "action on the contract contained in the bill of lading. In this "respect, the assignment of a bill of lading differed greatly from "that of a bill of exchange, for the indorsee of a bill of exchange "is by the law merchant entitled to sue the previous parties to the "bill in his own name, and is by the indorsement rendered a party "to the contract, though not one originally"; but in the case of a bill of lading it was different, "and there was no means what-"soever by which any person could be rendered a party to the "contract" evidenced by "a bill of lading, who was not a party "to it from its first inception. Even if the assign of the bill of "lading had acquired the full legal and equitable property in the "goods, so that the damage arising from the non-delivery was "exclusively his, still he was compelled to bring any action on the "contract in the name of the original contractor as his trustee"; for, at common law and apart from the customs of the law merchant, the rule, as we have seen, was that a right of action arising from contract could not be assigned so as to enable the assign to sue upon it in his own name, and no custom of merchants was ever recognised in the Courts, making an action on a bill of lading an exception to that rule.

If, then, goods were sold, and consigned to the seller's agent, the assignment of the bill of lading to the buyer was, according to the law merchant, good evidence of his right of property to the goods, but until 1855 he had no right to sue in his own name on the contract evidenced by the bill of lading.

* Blackburn on Sale, 2nd ed. 389-390; *cf.* 1st ed. (1845), 275-276.

Bills of Lading Act, 1855.

The Bills of Lading Act, 1855, confers this right.

That Act recites as follows:—"Whereas by the custom of mer-"chants a bill of lading of goods being transferable by endorse-"ment the property in the goods may thereby pass to the endorsee, "but nevertheless all rights in respect of the contract contained in "the bill of lading continue in the original shipper or owner, and "it is expedient that such rights should pass with the property: "

And it enacts as follows:—

1. *Rights under bills of lading to vest in consignee or endorsee.*]—"Every consignee of goods named in a bill of lading, and every "endorsee of a bill of lading to whom the property in the goods "therein mentioned shall pass, upon or by reason of such consign-"ment or endorsement, shall have transferred to and vested in "him all rights of suit, and be subject to the same liabilities in "respect of such goods as if the contract contained in the bill of "lading had been made with himself."*

Nearly thirty years after the passing of the Act, an important question first arose as to the proper construction of this section. In *Burdick v. Sewell*, which was finally decided in the House of Lords in 1884,† certain machinery had been shipped by one Nercessiantz on the plaintiff's ship in London to be carried to Poti in the Black Sea, under bills of lading whereby the goods were made deliverable to the shipper or his assigns, and freight and disbursements were to be paid at the destination, and in default the shipowner was to have an absolute lien on the goods, and liberty to sell by auction and retain freight and all charges. Nercessiantz obtained from the defendants, who were bankers in Manchester, a loan of £300 on depositing with them as security the bills of lading indorsed in blank. The ship arrived at Poti, and the goods were landed and warehoused at the Russian custom-house. The bankers indorsed the bills of lading to their agents in Russia with instructions to protect their interests, and informed the shipowner that if the goods were sold to pay freight etc., they, the bankers, claimed all the proceeds over and above the amount due to the shipowner for freight, etc., but the bankers never claimed delivery of the goods. Meanwhile Nercessiantz had disappeared, and

* The remainder of the preamble, and s. 3 of the Act, are printed, *post*, p. 20. S. 2 provides that nothing in the Act shall affect the right to stop *in transitu* or to claim freight, or the liability of the consignee or endorsee. This constitutes the whole Act, which will be found printed in the Appendix to many well-known text-books on mercantile law:—*e.g.* Scrutton on Charterparties and Bills of Lading, Ker and Pearson-Gee on the Sale of Goods Act, and Chalmers on the Sale of Goods Act.

† 10 A.C. 74.

after a year the goods in accordance with Russian law were sold to pay custom-house duty and charges, and realized no more than enough for that purpose. Thereupon the shipowner demanded the freight and charges from the bankers, and upon their declining to pay brought an action against them for the amount.

The plaintiff's contention was that by indorsement and delivery of the bills of lading to the bankers *the whole property* in the goods had, by virtue of the Bills of Lading Act, 1855, passed to them; on the one hand entitling them to sue, and on the other rendering them subject to the same liabilities in respect of the goods as the original shipper. The Court of Appeal by a majority upheld this contention,* which would have made the bankers liable for the freight and charges, besides losing the whole of their loan; but the House of Lords reversed this decision on the ground that the indorsement and delivery of bills of lading did not, as held by the majority of the Court of Appeal, *necessarily* pass the whole property in the goods, so as to transfer to the indorsee all liabilities in respect of them. The question whether any, and if so, what property passed to the indorsee, depended in each case on what was the *intention of the parties* at the time of indorsing the bills of lading. If there was a *sale* of the goods out and out, the *whole property* would pass to the indorsee with all liabilities; but if the intention was, as here, to give a *pledge* by way of security, the *general* property remained in the indorser and only a *special* property passed to the indorsee. In short, the entire property in the goods does or does not pass by such indorsement and delivery according to whether it is or is not the intention of the parties that such property should pass, just as under similar circumstances the entire property would or would not pass by an actual delivery of the goods themselves.

A banker, therefore, who has acquired only such a limited and special interest in a bill of lading as is necessary to secure his advance, and has not taken actual delivery of the *goods*, is not an indorsee to whom *the* property in the goods has passed within the meaning of the Bills of Lading Act, and consequently there has not been a transfer to him of all the rights of suit and liabilities in respect of the goods of the shipper.

We have seen that a bill of lading is the symbol of the goods mentioned in it as long as the goods are at sea; possession of the bill of lading being for most purposes equivalent to possession of the goods, but the question remains: When does it cease to be this symbol? After the goods are landed, how soon will possession of the bill of lading cease to be equivalent to possession of the goods? Moreover, it is the practice, as has been seen, for bills of lading

* 13 Q.B.D. 159.

to be drawn in sets of three, and to contain a statement that one being accomplished, the others are to stand void. What, then, happens if after landing the goods different bills of the same set are in the hands of rival claimants? Who is then deemed to be in possession of the goods?

These important questions arose for decision in the case of *Meyerstein v. Barber*, decided by the House of Lords in 1870.* In that case De Souza & Co. of Madras shipped on board the Acastus, bound for London, some bales of cotton, consigned for sale on commission to Azémar & Co. of London, upon whom De Souza & Co. drew bills of exchange for £6,000 against the cotton. De Souza & Co. discounted these drafts with the Chartered Mercantile Bank of India, and having received three bills of lading forming one set, indorsed these in blank and deposited them with the Bank as security for the payment of the bills of exchange. The bills of exchange were duly accepted by Azémar & Co., who shortly afterwards transferred their business to one Abraham. The Acastus arrived at St. Katherine's Docks, and Abraham, having made the usual entry at the Customs House, intimated that the cotton was to be landed and warehoused at a specified sufferance wharf; and this was done, two stop orders being lodged against it —one by the Bank for the amount of their advance and the other by the master for freight. Abraham then instructed Barber & Co., brokers, to sell the cotton, and on 4th March, with money borrowed from a gentleman named Meyerstein, he paid off what was owing to the Bank, from whom he obtained the three bills of lading and removed their stop order. Abraham then on the same day deposited with Meyerstein as security for his advance *two* of the three bills of lading, but fraudulently retained the *third* of the set, which on the 7th March he deposited with Barber & Co., who were ignorant of these transactions, and who advanced him £2,000, he, Abraham, having then removed the stop for freight. On 13th March Barber & Co. obtained from the wharfingers delivery warrants for the bales of cotton, which they sold to different purchasers, who received them under the warrants. When Meyerstein tried to obtain possession of the goods, he found they had been removed. He claimed that his title took precedence of that of Barber & Co., while they claimed the right to satisfy their advances out of the proceeds of the sale. Meyerstein then brought an action against Barber & Co.

On behalf of the defendants it was contended that as against them the plaintiff was not entitled to the goods or their proceeds; that the bills of lading *ceased to have any operative force* after the landing and warehousing of the goods in Abraham's name, and therefore that the subsequent indorsement of the bills of lading to

* L.R. 4 H.L. 317.

the plaintiff was invalid, and gave him no property in the goods; and that the property had passed to the defendants on the transfer of the goods into their names by the wharfingers, and that the defendants thereby became pledgees, with possession of the goods and with power of sale. The Courts, however, overruled these contentions, and the verdict was entered for the plaintiff for the full value of the goods and interest;* and on appeal to the House of Lords this was affirmed.†

The case mainly turned upon the point whether or not the bills of lading had fully performed their office, and were *discharged and spent* at the time that the plaintiff took his security. Whether, in other words, the landing of those goods at the sufferance wharf in the name of the consignee, but subject to the stop which was put upon them by the shipowner, and the stop put upon them by the bank was, or was not, a delivery which had exhausted the whole effect of the bill of lading.‡ The Courts decided that it was not. It was argued for the defendants that after Abraham had paid off the bank and obtained the bills of lading—during the few hours that the three bills of lading were in his possession, before he had deposited two of them with the plaintiff, Meyerstein—the goods were what is called "at home"; that the transit had come to an end, and that Abraham had the control and ownership of the goods. But, on the other side, it was asked, supposing he had gone down to the wharf to demand the goods, what would have happened? The stop for freight was still on them, and until that was removed he could not have obtained any warrant of delivery. The goods were therefore not "at home"; the bills of lading were still *operative and unexhausted;* they were still the symbol of possession of the goods—practically the *key* of the warehouse—for until the stop for freight was removed, and one of the bills was presented to the wharfinger, he would not be justified in giving a warrant of delivery or in delivering the goods. Before Abraham was able to remove the stop for freight, he had pledged the bills of lading with the plaintiff.

Another argument for the defendants was that admitting that the bills of lading were still operative, yet that the assignment of the two bills to the plaintiff had no priority over the assignment of the third bill to the defendants; that each bill was of *equal force* until one of them had been accomplished; that if one bill of a set was assigned for value to A., and the second to B., and the third to C., it became a mere race between the three holders which of them could first obtain delivery of the goods; and that the defendants having obtained the goods on the strength of *their* bill, the plaintiff's rights were ousted. It was held, however, that

* L.R. 2 C.P. 38, and 661. † L.R. 4 H.L. 317. ‡ *Ibid*, at 324-325.

the person who first obtained the assignment of one bill of the set in good faith and for value gained priority over those who obtained other bills of the set, and the plaintiff was therefore entitled to succeed.

This case of *Meyerstein v. Barber* illustrates the embarrassment sometimes caused by the mercantile practice of drawing bills of lading in sets of three, and the opportunity which it affords for fraud. Several eminent Judges have drawn attention to the matter and expressed grave doubt whether in these days it would not be better to alter the practice, and draw one bill of lading instead of three, but so far the mercantile world abides by the practice.

We have seen that the person, whether a banker or not, who advances money on the security of the *first* assignment of one bill of lading gets priority over *subsequent* assignees of other bills of the same set; but if he obtains only one or two of a set of three, it is necessary for him to be on the alert; for either the master of the ship, or, if the goods have been landed, the warehouseman, is justified in delivering them on production of one bill of the set to the holder, although there has been a prior indorsement for value of another bill of the set, provided the delivery be given in good faith and without knowledge of the prior indorsement.

This point was decided in 1882 in the House of Lords in the case of *Glyn, Mills, Currie & Co. v. The East and West India Dock Co.** In that case sugar was shipped in Jamaica and consigned to Cottam & Co., London, as owners. The captain signed a set of three bills of lading, marked "first," "second," and "third," respectively, making the sugar deliverable to Cottam and Co. or their assigns, freight payable in London. Each bill contained a clause mentioning "three bills of lading all of this tenor and date, the one of which bills being accomplished, the rest to "stand void." During the voyage Cottam & Co. applied to Messrs. Glyn & Co., the bankers, for an advance, and delivered to them as security the bill of lading marked "first" indorsed by Cottam and Co. in blank. The bankers therefore had distinct notice on the face of the bill that there were two other bills of the set. The ship arrived on the 27th May, and next day the goods were entered at the Custom House by Cottam & Co. as proprietors. The master availed himself of the provisions of the Merchant Shipping Act, 1862, and landed the goods at the East and West India Dock Company's docks, lodging there a stop for freight. The course of procedure to be followed in such cases was laid down by Sections 66 to 78 of that Act, which are now reproduced by Sections 492 to 501 inclusive of the Merchant Shipping Act, 1894.† On 31st May

* 7 A.C. 591.

† These sections are printed in Scrutton on Charterparties and Bills of Lading, 4th ed., 356-359.

Cottam & Co. produced to the Dock Company the bill of lading marked "second," not indorsed, and the Dock Company entered Cottam & Co. in their books as proprietors of the goods. The stop for freight being afterwards removed, the Dock Company bonâ fide and without notice or knowledge of the Bank's claim delivered the goods to other persons upon delivery orders signed by Cottam and Co. Glyn & Co., who had not lodged a stop order, as they might have done, then sued the Dock Company for conversion of the goods.

The real question was whether the Dock Company were under such circumstances justified in, or excused for, delivering to Cottam and Co.'s order, though, if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co., it would have been a misdelivery, for which they would have been responsible. The Dock Company held the goods under the statute subject to a duty imposed by the statute, to deliver them to the person to whom the shipowner was bound to deliver them; and they would be justified or excused by anything which would have justified or excused the master of the ship in delivering them.*

What, then, would have been the position of the master in the circumstances arising in this case? He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading—in this case Cottam & Co.—or their assigns; in other words, to Cottam & Co. if they have not assigned the bill of lading, or to the assign if they have. If there were only one bill of lading, and not a set of three, the obligation of the master under such a contract would be clear; he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to anyone producing the bill of lading with a genuine indorsement by Cottam & Co. He would *not* fulfil his contract if he delivered them to anyone else.† But where there are three bills of lading all of the same tenor, and one of them is produced either by the person named as consignee, it being unindorsed, or by the holder, it being duly indorsed, the master having no notice or knowledge of anything except that there are others of the set, is not bound to ask for these. If, indeed, he has notice or knowledge that one of the set has been assigned, he cannot on production of another safely deliver the goods without further inquiry as to who is rightfully entitled to them.

As the same principles applied to the Dock Company in the present case, it was held that they were justified under the circumstances in delivering to the consignee, and that the Bank could not maintain any action against them.

* See *per* Lord Blackburn, 7 A.C. at 609. † *Ibid.*, at 610.

Summary of Cases Cited.

Before passing away from these two important decisions of the House of Lords let me summarize their effect in four propositions; the first two of which are established by the case of *Meyerstein v. Barber*, and the last two by *Glyn, Mills, Currie & Co. v. East and West India Dock Co.*:—

1. A bill of lading is a living, unexhausted instrument, not only during the voyage, but as long as the goods are held by or on behalf of the master under a lien for freight, even though they have been landed.

2. When two or more bills of lading of one set are transferred to two or more different bonâ fide transferees for value, the title of the transferee who is *first in point of time*, although he does no act to assert his title, prevails over that of subsequent transferees.

3. But, nevertheless, the master or warehouseman, provided he acts in good faith and without knowledge of any other claim, may safely deliver the goods to the holder who first presents to him one bill of the set.

4. If the master or warehouseman, however, when one bill of a set is presented to him by one holder, has notice or knowledge that another bill of the set has been transferred for value to another holder, he will deliver the goods to either at his peril; for, if he delivers them to the one who is not the rightful holder, he will be liable to the other in damages. His best course in such a case is to interplead—*i.e.*, leave it to the Court to determine which of the two is rightfully entitled.

Reservation of Right of Disposal.

It is, of course, a common practice for the seller of goods to reserve the right of disposal until certain conditions are fulfilled. "In such case, notwithstanding the delivery of the goods to the "buyer, or to a carrier or other bailee or custodier for the purpose "of transmission to the buyer, the property in the goods does not "pass to the buyer until the conditions imposed by the seller are "fulfilled.*

"Where goods are shipped, and by the bill of lading the goods "are deliverable to the order of the seller or his agent, the seller "is *primâ facie* deemed to reserve the right of disposal."†

An ordinary mode of reserving this right is for the seller to draw a bill of exchange on the buyer for the price, and where the

* Sale of Goods Act, 1893, s. 19 (1). † *Ibid.*, s. 19 (2).

goods have to be shipped, for him to adopt one of the two following courses:—

1. The seller forwards the bill of exchange for acceptance together with one of the bills of lading, (usually sending also an indorsed bill of lading to his own agent); in which case, "the "buyer is bound to *return* the bill of lading if he does not honour "the bill of exchange, and if he wrongfully retains the bill of lading, "the property in the goods does not pass to him";* or,

2. The seller discounts the bill of exchange at a bank, depositing an indorsed bill of lading as security for the advance, and leaving the bank to present the bill of exchange for acceptance, together with the bill of lading; in which case, the buyer cannot obtain the bill of lading until he satisfies the bank's claim for advances.†

How far Bill of Lading is Evidence of its Contents.

There is one other provision of the Bills of Lading Act, 1855, to which attention should be drawn. That Act recites:—"Whereas "it frequently happens that the goods in respect of which bills of "lading purport to be signed have not been laden on board, and it "is proper that such bills of lading in the hands of a bonâ fide "holder for value should not be questioned by the master or other "person signing the same on the ground of the goods not having "been laden as aforesaid";

And it enacts as follows:—

3. *Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master, etc.*]—"Every "bill of lading in the hands of a consignee or endorsee "for valuable consideration representing goods to have been "shipped on board a vessel shall be *conclusive evidence* of such "shipment *as against the master or other person signing the same*, "notwithstanding that such goods or some part thereof may not "have been so shipped, unless such holder of the bill of lading shall "have had actual notice at the time of receiving the same that "the goods had not been in fact laden on board: Provided, that "the master or other person so signing may exonerate himself in "respect of such misrepresentation by showing that it was caused "without any default on his part, and wholly by the fraud of the "shipper, or of the holder, or some person under whom the holder "claims."

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* Sale of Goods Act, 1893, s. 19 (3).

† *Turner* v. *Liverpool Docks* (1851), 6 Ex. 543; and see Scrutton on Charterparties and Bills of Lading, 4th ed., 138.

Now that provision was no doubt intended to remedy a serious grievance, but unfortunately the Houses of Parliament too often appear, like another place, to be paved with good intentions, and to fail in carrying these into effect by their Acts. This section has accordingly proved of little practical use. You will notice that it makes the bill of lading conclusive only "as against the master "or other person signing the same"—that is to say, as against the person in whose name or with whose authority it is signed. This, according to a decision of the Court of Appeal,* includes a person for whom a clerk or servant signs in a purely ministerial capacity, but does *not* include the principal of an agent, such as a master or shipping broker, who has discretionary powers. In other words, the shipowner, in the absence of some express provision, is still not bound by bills of lading signed by the master or shipping broker where the goods were *never actually put on board*, even where they have been received alongside and taken into the ship's custody for the purpose of being carried; and the bill of lading is, therefore, in such cases conclusive *only* as against the master or shipping broker who actually signed it, and the remedy will in many cases be solely against him.†

It is, therefore, clear that this section has not increased the liability of the *shipowner*. The bill of lading is, however, *primâ facie* evidence against *him* that the goods were shipped, and the burden of *disproving* it lies on him.‡

Immunity of Shipowners.

Moreover, the nature and limitations of the master's authority are well known among mercantile men, and he is only authorized to perform all things usual in the line of business in which he is employed. It is, for instance, not within his ordinary authority, by signing a bill of lading stating quality marks copied from the shipping notes—*i.e.* marks indicating the quality of the goods—to admit that the marks so stated tally with those actually on the goods; such an admission, if made, will therefore not bind the shipowners.§

It will thus be seen that shipowners often remain, notwithstand-

* *Thorman* v. *Burt* (1886), 54 Law Times Rep. 349, C.A.

† This and other defects of the Act, are discussed in an able article by Mr. T. G. Carver, K.C., in the Law Quarterly Review, for July, 1890, Vol. 6, pp. 289 *et seq.*

‡ *Smith* v. *Bedouin Nav. Co.* (1896), A.C. 70.

§ *Cox* v. *Bruce* (1886), 18 Q.B.D. 147. As to the effect of marks described in bills of lading generally, see the recent case of *Parsons* v. *New Zealand Shipping Co.* (1901), 1 Q.B. 546, C.A.

ing serious inaccuracies in the bills of lading, free from responsibility to those who advance money on this class of security. The clause frequently inserted "Weight, quantity and quality un-"known" has been held to override a definite statement in the bill of lading of the number and marks of the packages shipped, and thus prevents such a statement from being conclusive even as against the master or person signing the bill of lading.*

The Harter Act.

Some persons—especially perhaps consignees and indorsees of bills of lading—might be inclined to think that the immunity of shipowners was already sufficiently extensive, but from any such illusion the Legislature of the United States appears to be free, as is shown by an Act of Congress known as the Harter Act, passed in 1893.

Section 3 of that Act provides: "That if the owner of any "vessel transporting merchandise or property to or from any port "in the United States of America shall exercise due diligence to "make the said vessel in all respects seaworthy and properly "manned, equipped, and supplied, neither the vessel, her owner or "owners, agent, or charterers shall become or be held responsible "for damage or loss resulting from faults or errors in navigation "or in the management of the said vessel. . ."

It will be seen that these terms are fairly wide, and as they apply to the owner, agent, and charterer of every vessel trading to or from any port of the United States, and are now expressly incorporated with some bills of lading, those who are interested in these bills of lading, and especially those who regard them as *securities*, may rest assured that no unfair or oppressive responsibility will rest upon the owners or charterers of those vessels. How far the freedom of responsibility "for *damage or loss result-*"*ing from faults or errors in the management of the vessel*" may be held to extend has not yet been made clear; but very recently it was held by Mr. Justice Walton in the Commercial Court—that that clause did *not* protect the owners of a vessel in which some butter had been shipped in good condition in New York, which had been delivered damaged in London, there being no affirmative evidence that the damage had been caused by "fault or error in "the management of the vessel."†

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* *Jessel* v. *Bath* (1867) L.R. 2 Ex. 267.

† *Mills* v. *Atlantic Transport Co.* (1901) The Times, 19th November, 1901. The effect of the Harter Act has been discussed in various cases in our Courts. See *Dobell* v. *Rossmore S. S. Co.* (1895) 2 Q.B. 408, C.A. (where the Act is printed in full); *The Glenochil* (1896) Prob. 10; *The Rodney* (1900) Prob. 112.

Through Bills of Lading.

Time will not permit of my discussing at any length what are known as *through bills of lading*, although they have come into such frequent use of late years as to form an important class of mercantile instrument.

A *through bill of lading* is defined by Mr. Scrutton as "one "made for the carriage of goods from one place to another by "several shipowners or railway companies. The contract in such "bill of lading to carry for the whole distance is one contract "made with the company signing and delivering the bill of lading, "and in the absence of express provisions that company would be "liable for loss occurring on any part of the journey";* but, as a matter of fact, such bills of lading usually contain an express limitation of the liability of each carrying company for such loss or damage as may occur while the goods are in its possession.†

Through bills of lading are largely used in the cotton trade. The following example is given by Mr. Carver in an instructive Article in the Law Quarterly Review for 1890:‡—"A bill of lading "is given at Memphis (Tennessee) to a merchant who there de- "livers a number of bales of cotton to a railway company. It "represents that that company and its connections will carry the "cotton to, let us say, Norfolk (Virginia), and there deliver it to "a certain steamship, or to one of a named line of steamers, in "which it is to be carried to Liverpool and there delivered to the "order of the original shipper, on payment of an agreed rate of "freight which covers the whole journey."

In practice, though a ship may be named in the through bill of lading, it is quite uncertain whether that ship will carry the cotton; and even where the contract provides for forwarding by one of a certain *line* of vessels, it is found necessary to reserve liberty to ship by other lines. The movements of ships, and the time occupied by the railway transport, cannot be calculated with sufficient accuracy.§

"The object of using this through document is not merely to "simplify the transport arrangements, but also to at once furnish "the merchant with a document to represent the goods, and so "enable him to obtain advances from bankers upon them."‖

The question how far bankers can safely make advances on this class of security raises far too many difficult points of law for me to attempt to enlarge upon in these lectures. Grave doubts may be entertained whether any of these documents—which have come

* Scrutton on Charterparties and Bills of Lading, 4th ed., 57.

† *Ibid*, note (*o*). ‡ Vol. 6, pp. 295-296. § See *ibid*, 296.

‖ *Ibid*, 295.

into use since the passing of the Act of 1855—are bills of lading within the meaning of that Act.*

Negotiability of Bills of Lading.

Before quitting the subject of bills of lading, let us now see to what extent the ordinary bill of lading is a *negotiable instrument.* You will remember the two main requisites of a negotiable instrument in the strict sense:—

1. It must be transferable by mere delivery, or by indorsement and delivery, so that the property in it shall pass to the transferee free from any defect of title of the transferor or of any prior holder.

2. The holder must be able to sue on it in his own name.

A bill of lading, as we have seen, is usually transferable by indorsement and delivery, and for that reason is frequently called a negotiable instrument, but the indorsement does not pass the property to the indorsee free from any defect of title of any prior holder. The Factors Act and certain sections of the Sale of Goods Act, which will be considered in subsequent Lectures, do, it is true, under special circumstances afford protection to innocent indorsees, who may *then* get a better title than their indorser. But, in cases not within the purview of those enactments, where the indorser has a defective title—for instance, where, as in *Meyerstein v. Barber*, having already indorsed for value one bill of lading of a set, he indorses a second to another indorsee—the title of the second indorsee is subject to the indorser's defect of title: in other words, his rights are subject to the claim of the holder of the first bill being satisfied.

As to the other requisite of a negotiable instrument—the ability of the transferee to sue on the bill of lading in his own name—we have seen that before 1855, he could in no case do this; and that by virtue of the Act of 1855 he can now do so in those cases only in which the *whole property* in the bill of lading has passed to the indorsee, but not where only a *special* property has passed to him —as where it has been pledged by way of security only. In short, an ordinary bill of lading is a negotiable instrument in the wide sense of the term, but not in its strict sense.

Moreover, in some bills of lading the words "*or order or*

* Those who are specially interested in these documents are referred to a full discussion of them in the article by Mr. Carver above mentioned, and in another instructive article in the Law Quarterly Review for 1889, Vol. 5, 424, on Through Bills of Lading, by Mr. H. D. Bateson, and to Scrutton on Charterparties and Bills of Lading, 4th ed. 57–58, and note on p. 133.

"*assigns*" are omitted;* while others—such as those issued in America and used by the White Star Line—are marked "not "negotiable"; and these bills of lading would appear not to be negotiable in any sense.

That trustworthy monitor, the clock, warns me that there must be a limit to our united powers of consuming the very substantial fare provided for the hour's entertainment. I find that I have been unable to treat in the time of all that was announced to form the subject of Lecture I, and I must ask you to excuse my holding over what remains till our next meeting.

A friend who has taken a kindly interest in these lectures was good enough to suggest that they might be made easier of digestion if the somewhat gloomy nature of the subject could be lightened by a few sprightly and even jocular touches. I felt truly grateful for my friend's suggestion, but I must also confess to a sense of perplexity. I felt how pleasant it would be, if I only had the gift, to expound the law of pledges and liens in a light and airy style, and even, if possible, to throw the glamour of poetry and romance over bills of lading and dock warrants! At the same time I was conscious of my own lack of the happy faculty requisite for the task. I was also bound to bear in mind that I was to have the honour of addressing a number of gentlemen part of whose business it was to grant loans and advances, and my experience of life had taught me that it is the borrower rather than the lender who has the keenest appreciation of the humour of such transactions.

* See *e.g. Henderson* v. *Comptoir d' Escompte de Paris* (1873), L.R. 5 P.C. 253, where the effect of this omission is considered by the Privy Council.

LECTURE II.

SUMMARY OF LECTURE I. DOCK WARRANTS, DELIVERY ORDERS, WAREHOUSE-KEEPERS' CERTIFICATES AND SIMILAR DOCUMENTS. TRANSFER OF TITLE TO GOODS. THE FACTORS ACTS:—MERCANTILE AGENTS: FACTORS AND BROKERS; DOCUMENTS OF TITLE. NEGOTIABLE INSTRUMENTS.

Summary of Lecture I.

BEFORE making any fresh observations, I propose to recapitulate shortly what I said to you in my first Lecture. I began by referring to the different points of view of business transactions often taken by lawyers and commercial men, and suggested as one cause of the difference that while the latter were chiefly occupied with bonâ fide transactions, the attention of lawyers was more particularly directed to the comparatively rare cases in which one of the parties was guilty of fraud. I then proceeded to define and illustrate certain terms, pointing out the necessity for accurate definition, and the confusion caused by the practice of using the same term in different senses. Some account was given of the Law Merchant, or custom of merchants, founded on the *lex mercatoria*, or general body of European usages relating to commerce, and gradually adopted by our common law. An explanation was given of pledge, to which delivery, either actual or constructive, was shown to be essential, the pledgee getting a special property, while the pledgor retained the general property, in the goods

pledged. Hypothecation, properly applicable to shipping, was seen to be of two kinds:—bottomry, where money had to be borrowed on the security of the ship, and respondentia, where the cargo or goods were the security; while the word hypothecation was also seen to be used in a much wider sense, not connected with shipping, as a general term equivalent to a charge over property. Having defined lien as a right to retain property until a debt due to the person retaining it should have been satisfied, we passed on to the three different kinds of security: personal, on property, and judicial. Reference was made to the advantages of obtaining personal security—such as a bond or promissory note—for enforcing payment, or raising money by assigning the debt. A security on property giving a right to enforce a debt by means of the property, though the debtor became bankrupt, or absconded, or died, was said to be active, where there was a power of sale; passive, where there was no power of sale. Such a security might be specific, giving a right over some particular property; or floating, giving a right over such property as should come under a certain description at the time when the rights of the parties had to be ascertained; *e.g.* mortgage debentures of a Company charging its property for the time being, including stock-in-trade, book debts, etc., which would become fixed on a contingency, such as the liquidation of the Company. We also saw that security was used in a secondary sense to denote the instrument by which a security is evidenced, as when we speak of Government securities. We next considered the meaning of negotiable instruments, and found that in its strict sense the term was confined to bills of exchange, promissory notes (including bank notes), cheques, exchequer bills, East India bonds, dividend warrants, and some (though not all) scrip and bonds. The precise definition I shall have occasion to refer to again.* We also saw that the term is frequently used in a much looser sense to include such documents as bills of lading, which possess some but not all of the requisites of a negotiable instrument. A cheque crossed "*not negotiable*" was seen to be not negotiable in the strict sense, but negotiable in the wider sense. An explanation was next given of the contract of affreightment, which was contained in a charterparty when the whole ship was let to a charterer, and evidenced by a bill of lading when the contract of affreightment related only to goods which were to form part of the intended cargo. A bill of lading was defined as a receipt for goods embarked signed on behalf of the shipowner undertaking to deliver them at the end of the voyage (subject to conditions mentioned) to a person named or assigns, or to order or assigns. The form of a bill of lading was

* This reference is now made in the Note on Negotiable Instruments printed at the end of this Lecture, *post*, pp. 48-49.

then discussed, the excepted risks in the case of sailing vessels, and some additional risks in the case of steamships, the undertaking to pay freight, and the agreement as to general average, the York-Antwerp Rules being often now adopted. General average was seen to be the apportionment of the loss among all the parties interested in ship or cargo in proportion to their interest, where the loss is caused intentionally and for the common safety, as by cutting away masts or throwing cargo overboard. The clause "freight and all other conditions as *per* charterparty," was seen to have the effect of incorporating in the bill of lading certain conditions of the charterparty, making it incumbent on the assignee to look to those terms, which might render him liable for charges such as charterparty demurrage. We noticed the usual clause referring to three bills of lading, "one of which being "accomplished, the others to stand void," and also the clause "Weight, quality, quantity and contents unknown," which was deemed to override a definite statement of the number and marks of a shipment. We next saw how before 1855 the assignee of a bill of lading was, unlike the assignee of a bill of exchange, not deemed a party to the contract, and unable to sue on it in his own name; but how in the case of an out and out sale of the goods, those rights and the corresponding liabilities were conferred on him by the Bills of Lading Act, 1855; and how in the case of *Burdick v. Sewell* in 1884 the House of Lords had decided that under that Act those rights and liabilities were transferred to the consignee or indorsee only in cases in which *the* property—*i.e.* the *whole* property—in the goods, and not merely a *special* property (as in the case of a pledge) had passed to him. Illustrations were then given of fraud facilitated by the practice of signing bills of lading in sets of three, and the decisions of the House of Lords in *Meyerstein v. Barber* in 1870 and *Glyn & Co. v. East and West India Dock Co.* in 1882 were seen to establish four propositions respecting the transfer of such bills. The reservation by the seller of the right of disposal of goods was touched upon, and the ordinary modes of reserving this right were seen to be by drawing a bill of exchange on the buyer for the price, and either forwarding it with the bill of lading, or discounting it at a bank and depositing there an endorsed bill of lading. Section 3 of the Bills of Lading Act, 1855, which made a bill of lading conclusive evidence of shipment against the person signing it, was seen not to increase the liability of the shipowners, who usually are liable for those acts only of the master or agent which are within the ordinary scope of his authority. The American Harter Act, 1893, had further extended the immunity of shipowners in the cases to which it applied. After defining *through bills of lading*, and pointing out the extensive use now made of them, some reasons were given

for not regarding such documents, which are rarely, if ever, bills of lading within the Act of 1855, as a satisfactory kind of security. Finally it was seen that an ordinary bill of lading, although usually negotiable in the sense of being transferable, was never negotiable in the strict sense: its indorsement conferred the right to sue in his own name *only* on the indorsee who took the whole property in it, and, in cases not governed by the Factors Act or certain other Acts, the transferee did not get a better title than his transferor.

This is our starting point this evening, and I will now ask you to turn your attention to the subject of dock warrants, delivery orders, warehouse-keepers' certificates, and similar documents.

Dock Warrants.

A dock warrant is a document issued by a dock company or dock owner stating that certain goods therein mentioned are deliverable to a person therein named or to his assigns by indorsement.*

Let us take an ordinary dock warrant issued by the London and India Docks Co. such as those I hold in my hand. Each one is numbered and dated and bears a 3d. stamp.† I will read you the substance of one.‡

The first of these forms is a dock warrant used for general purposes. The second is used for puncheons of rum. The third is a tea warrant. The fourth is a warrant used for silk piece goods.

Delivery Orders.

A *delivery order* is an order addressed by the owner of goods to a dock company, warehouse-keeper, wharfinger, or other bailee, requesting delivery of the goods to a person named in the order.

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* Sweet's Law Dictionary, "Dock Warrant."

† The stamp duty on a warrant for goods is three pence: see the Stamp Act, 1891, s. 111, and Schedule Warrant for Goods. The stamp may be either impressed (s. 2), or adhesive (s. 111 (2)).

‡ See the Forms on the following pages.

§ *Cf.* Sweet's Law Dictionary, "Delivery Order." It seems far better to restrict the use of the term "delivery order" to an order made by the owner of goods, and not to use it, as is frequently done, as a general term to include a warrant issued by warehouse-keepers. In *Inglis* v. *Robertson* (1898), A.C. 616, for instance, where the warehouse-keepers' warrants contained the conditions set out in Form No. 7, *infra*, expressly referring to "delivery orders" to be signed by merchants, the warrants themselves are spoken of throughout the case as "delivery orders." This necessarily leads to much confusion. The importance of the distinction is pointed out in my Answer to Questions 10 and 11, in Lecture III, *post*, pp. 55-60.

No. 1.

London and India Docks Company.

Dock Lot.

No. U 44266

ROT^N.

Dated this 1901.

Warrant *for* (such and such goods)
imported in the Ship A., *Master* B., *from* the Port of X., *entered by* C.
on the (date) *deliverable to* D
or Assigns by endorsement hereon. *Rent commences on the*
(date) *and all other charges from the date hereof.* (Amount of) *Rate charged.*

Stamp Three pence.

MARK.	NUMBERS.		WEIGHT.						MARK.	NUMBERS.		WEIGHT.					
			Gross			Tare						Gross			Tare		
	Original.	Dock.	Cwt.	qrs.	lbs.	Cwt.	qrs.	lbs.		Original.	Dock.	Cwt.	qrs.	lbs.	Cwt.	qrs.	lbs.

Ledger *F^o.*

Clerk. Warrant Clerk.

London and India Docks Company.

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No. 2.

London and India Docks Company.

WEST INDIA DOCK, RUM DEPARTMENT—WAREHOUSE No.

Rotation : 190
Customs'

Stamp Three Pence.

Warrant for (*quantity*) PUNCHEONS of RUM
Per the Ship *A.*, Master *B.*, from *X.*
Entered by *C.*, on the (*date*) 1901.
Rent commences on the (*date*) 1901.

Mark.	Dock No.	Gauge.		Mark.	Dock No.	Gauge.	
		Full.	Ullage.			Full.	Ullage.

Examined, and entered in Cargo Ledger No. folio

_____ Clerk. _____ Ledger Clerk.

Warrant No. *U18001* 190

Deliver the above-mentioned goods to *D.*, or assigns, as by Endorsement hereon.

_____ Warrant Clerk.

This Warrant must be presented at the General Office, West India Dock, regularly assigned by Endorsement, and all charges must be paid before delivery of the Goods can take place.

No. 3.

London and India Docks Company.

ST. KATHARINE DOCK.

TEA DEPARTMENT. ROTS._____

Stamp Three Pence.

London and India Docks Company.

No.
Lot

Dated this 1901.

Warrant *for* (quantity) **TEA** *entered by*
A. *on the* (date) *and*
declared by the Importer to be } *Imported in the* Ship **B.**
Master **C.** *from* **X.** *and Sold by* **W.**
Deliverable to **D.** *or Assigns by endorsement hereon, subject to the conditions hereon named. Prompt* (date)
Rent commences (date) *and all other charges from the date of this Warrant.*

OBSERVE.

A WEIGHT-NOTE for these goods has been issued, and no delivery will be made under this Warrant before the expiration of the Prompt, without the production of such Weight-Note.

The Possessor of the Weight-Note is entitled to this Warrant upon complying with the **Conditions** *of Sale and paying the balance of the* **Purchase-Money** *as expressed on the Weight-Note on or before the expiration of the Prompt.*

After partial deliveries this Warrant will be returned and the Bearer thereof entitled to the remainder of the Teas.

MARK.	Dock Numbers.	Customs' Landing Weight. Cwt.	qrs.	lbs.	Customs' Tare lb.	Sale Tare lb.	Sale Draft lb.
	Tare ..				lb.		lb.
	Nett ..				or		

DELIVERIES

THESE PARTICULARS TO BE FILLED UP BY THE APPLICANT.

Nos.	Date applied for	On whose Account and Signature of Bearer.	Conveyance.	Customs' Order No.	Clerk's Initials and Date.	Delivery Foreman's Initials and Date of Delivery.

Ledger *Fo.*

_____ **Clerk.** _____ **Warrant Clerk.**

No. 4.

London and India Docks Company.

NEW STREET WAREHOUSES.

No. P83178. *Goods put up at Public Sale.*

By W., *on the* (date) 1901. ROT$^{N.}$_____

Lot

Prompt (date). *Dated this* 1901.

Stamp Three Pence.

Warrant *for* (quantity of Silk piece goods) *imported in the* Ship A., *Master* B., *from* X., *entered by* C., *on the* (date) *deliverable to* D., *or Assigns by endorsement hereon, subject to the undermentioned conditions. Rent commences* (date) *and all other charges from the date hereof.*

Mark.	Dock No.	

A LOT NOTE for the above Goods has been issued, and no delivery will be made under this Warrant prior to the expiration of the above-named Prompt, without the production of such Lot Note.

The Possessor of the Lot Note is entitled to this Warrant upon payment of the balance of Purchase Money, as expressed on the Lot Note, at any time before the expiration of the Prompt. After the expiration of the Prompt the Lot Note will be of no validity.

Ledger *Fo.*

_____ *Clerk.* _____ *Warrant Clerk.*

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Warehouse-Keepers' Certificates.

A warehouse-keeper's certificate is a document issued by warehouse-keepers admitting that certain goods therein mentioned are in their warehouse.

It is sometimes in the form of an acknowledgment that the warehouse-keepers hold the goods at the disposal of the person therein named, subject to certain conditions, and is expressed to be not transferable;* and it is sometimes in the form of a transferable warrant to deliver the goods to such person or his assigns, also subject to conditions.†

Forms of Warehouse-Keepers' Certificates.

No. 5.

Reference number to be quoted on delivery order

Not transferable.

28 Q.3.

Messrs. A. & Co.

3*d.* Stamp.

We hold at your disposal in our warehouse subject to conditions as per back hereof 500 tons steel rails ex. S.S. Persia.

(*Signed*) W. & Co.

(*Conditions endorsed.*)

No. 6.

Warrant for Eighty bales of wool imported in S.S. Australia, Capt. Cook, from Sydney, entered by A., on the 1st June, 1901, deliverable to B. & Co. or assigns by endorsement hereon, subject to the undermentioned conditions.

3*d.* Stamp.

Mark.	Numbers.	Weight.

(*Signed*) W. & Co.

(*Conditions set out here.*)

* See Form No. 5, *infra*; and *cf. Gunn v. Bolckow*, where the wharfinger's certificate was not such an acknowledgment, *post*, pp. 45–47.

† See Forms Nos. 6 and 7, *infra*.

No. 7.

Office, 56, Hope Street,

Glasgow, 17th December, 1894.

Warrant for ten hhds. whiskey transferred in our books and held to the order of Walter Goldsmith or assigns by endorsement hereon.

Rent commences 3/6/95.

$\frac{94}{359}$ ℔ 31/40 Ten hhds. Whiskey.

F O

p. Clyde Bonding Co.
3d. Stamp.
Jno. Mathieson.

[*Endorsed on back.*] Transfer to my name.

Walter Goldsmith. *pro.* J. Bashford,

R. Inglis. W. Penwarden.

The following Conditions were on back of Warrant:—

Delivery orders must be signed by members of firms, or per procuration.

Merchants are particularly requested in granting delivery orders to state the date to which rent is payable.

Goods in bond are held subject to a general lien by the warehouse-keeper for all debts, present or future, due on any account to the warehouse-keeper by the party to whose order or in whose name the goods are lying in bond.

Coopering, etc., will be performed as required, at owner's expense.

Amount of duty should accompany order to clear from bond, as warehouse-keeper does not undertake to advance cash for duty.

Goods are not insured by warehouse-keeper, but lie in bond at owner's risk.*

* This warrant, with the conditions indorsed, is taken from the Appendix to the Cases lodged in the House of Lords in *Inglis* v. *Robertson* (1898). The conditions are not printed in the reports of that case.

Dock Warrants, Delivery Orders, etc.

The true nature of these documents will more clearly appear by observing the purposes and mode of their employment.

If the owner of goods lodge them with a warehouseman, they remain the owner's property, and constructively in his possession, because the warehouseman holds them for him. If the owner sells them to a buyer, they become the property of the buyer, and he has the right to take possession. Upon the buyer's presenting an order from the seller requesting the warehouseman to deliver the goods to the buyer, it becomes the warehouseman's duty to give him possession. It may be that the buyer prefers the goods to remain where they are for a time, and if the warehouseman consents to hold them for him he is said to "*attorn*" to the buyer. The goods are then constructively in the possession of the buyer.*

The warehouseman on his first receiving the goods makes an entry in his books, and in some cases gives a receipt to the owner when depositing the goods indicating them by marks, numbers, or description.† This being merely a *receipt*, before the goods are removed the owner must give a *delivery order*.

But very probably the owner may, as we have seen, desire to sell the goods while lying in the warehouse. In order to facilitate dealings with them, and to enable himself to act with greater safety, the warehouseman may, instead of a mere receipt, give a warrant, the forms of which have been already shown, promising to deliver the goods to the person named therein or to his assigns by indorsement.‡

The first warrants will be issued to the order of the importers or their assigns (provided there is no stop for freight or otherwise) upon payment of the *prime rates* or landing charges. Such payments must include all charges incurred to the time of passing the order or issuing the warrants excepting rent; charges accruing subsequently, and the rent, must be paid by the holders of the warrants before delivery of the goods. The owners of goods may, however, clear the rent and incidental charges to any desired date, and can then obtain fresh warrants.§

Sometimes warrants are issued *subject to landing charges*, and they are then called "*Prime Warrants.*"

Weight or *gauge notes*, corresponding to the warrants are furnished when required. The weight note states the weight of the

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* *See* Mr. A. T. Carter's Article on Dock Warrants, etc., *Law Quarterly Review*, 1892, Vol. 8, 301.

† The form of receipt is given by Mr. Carter, *ibid.*, and is practically identical with Form of Certificate, No. 5, *supra*.

‡ *Ibid.*

§ McCulloch's Dictionary of Commerce, ed., 1880, "Docks," p. 502.

goods, and the amount of the balance of the purchase money owing; and when issued, attention is called to its terms by the warrant.* The possessor of the weight note can upon complying with certain conditions and paying such balance on or before the expiration of the *prompt*, obtain the warrant.

The *prompt*, as you are aware, is the limit of time, varying according to the custom of the particular trade, for payment of the purchase money.

There are also documents called *lot notes*, which are issued to buyers in some cases where there has been a public sale by auction, and their possessor can in a similar manner obtain a warrant.†

When the removal or assignment of part only of the goods is intended, the warrants should be "*divided*" at the dock house. If part only of the goods is removed, a new warrant for the remainder of the parcel must be taken out. If part only is assigned without delivery, reweighing, etc., new documents will be given in exchange on lodging the originals, which must be duly indorsed with directions as to the manner in which the contents are to be divided, and with the names of the parties in whose favour the warrants are to be issued. Warrants may be exchanged or divided, when desired by the holder, without assigning the goods.‡

Difference between Dock Warrants, etc., and Bills of Lading.

Having gained some idea of the nature of these various documents, we shall presently see that under the Factors Act, the expression "document of title" includes for the purposes of that Act a dock warrant, delivery order, and warehouse-keeper's certificate as well as other documents,§ and a similar meaning is given to the expression in the Sale of Goods Act, 1893‖; but independently of these Acts and of certain Private Acts of Parliament, which will be referred to shortly, those documents are not regarded in law as documents of title at all, but merely as "tokens of an "authority to receive possession." A bill of lading, on the other hand, was always regarded by the law merchant as a "document "of title."

This difference is no longer so important as it once was, especially to bankers, because in the large majority of cases when

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* *See* Form of Warrant, No. 3, *supra*.

† *See* Form of Warrant, No. 4, *supra*.

‡ *See* Mc Culloch's Dictionary of Commerce, ed., 1880, "Docks," 499 *et seq.*, at 502, where the rules, regulations and rates at the East and West India Docks are fully set out.

§ Factors Act, 1889, s. 1 (4), *infra*, p. 45. ‖ S. 62 (1).

advances are made on the security of such documents, the transaction comes, as we shall see, within the provisions of the Factors Act. But as there can still arise cases which are not within that Act, or the other Acts just referred to, it is still necessary in those cases to bear in mind the difference between a bill of lading on the one hand and those documents on the other; for in such cases while the transfer of a bill of lading is equivalent for most purposes to *delivery* of the goods, the transfer of a dock warrant or delivery order has no such effect.

The reason for this difference has been explained thus:—"A "cargo at sea while in the hands of the carrier is necessarily in- "capable of physical delivery. During this period of transit and "voyage, the bill of lading by the law merchant is universally "recognised as its symbol, and the indorsement and delivery of "the bill of lading operates as a symbolical delivery of the cargo. "Property in the goods passes by such indorsement and delivery of "the bill of lading, whenever it is the intention of the parties that "the property should pass, just as under similar circumstances the "property would pass by an actual delivery of the goods."* But when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent for most purposes to an actual delivery of possession of the goods, and yet not give such an effect to the transfer of a delivery order or dock warrant.†

In cases not governed by the Factors Act, or the Sale of Goods Act, or certain Private Acts of Parliament, this difference, it has been seen, still holds good, and in such cases, therefore, the indorsee of a bill of lading is deemed for most purposes to be *in possession* of the goods, whereas the indorsee of one of the other documents is not.

Consequences of the Difference.

Now let me draw your attention to some of the consequences of this difference. Although *possession* does not, of course, decide the question of ownership, a possessor is, as a general rule, presumed to be absolute owner until the contrary is shown. Possession, therefore, is often a matter of importance and gives rise to special rights and consequences.

* *Per* Bowen, L. J., in *Sanders* v. *Maclean* (1883), 11 Q.B.D. at 341.

† *See* Blackburn on Sale, 1st ed., 298; 2nd ed., 415.

Under section 4 (1) of the Sale of Goods Act, 1893, which reproduces the 17th section of the Statute of Frauds, "a contract for "the sale of any goods of the value of ten pounds or upwards shall "not be enforceable by action unless the buyer shall *accept* part "of the goods so sold, and *actually receive* the same, or give some-"thing in earnest to bind the contract, or in part payment, or "unless some note or memorandum in writing of the contract be "made and signed by the party to be charged or his agent in that "behalf."

If, then, goods of the value of more than £10 are ordered verbally, the question often arises: Has the buyer accepted and *actually received* them? If he has accepted a *bill of lading* for them, being in actual receipt of the bill of lading, he is deemed to have *actually received the goods*, and they have passed out of the possession of the seller.* If, on the other hand, he has merely accepted a warehouseman's *warrant* for them, he is *not* deemed to have *actually received the goods*, and they have not passed out of the possession of the seller.† If then the buyer afterwards repudiates the contract, and is sued by the seller, the buyer, if he has accepted a bill of lading, cannot successfully plead the Statute of Frauds—or rather section 4 of the Sale of Goods Act—for he is deemed to be in actual possession of the goods; but if he has only accepted a warrant, he can successfully plead that section, for he is not deemed to be in actual possession of them.

Let me point out another consequence of this difference between these two classes of document. So long as the goods are in the seller's possession, he has a lien on them for their price.† If, therefore, he indorses a *bill of lading* to the buyer, as the goods are thereby taken out of the possession of the seller, he has *lost his lien*. It is true that if the buyer becomes insolvent he will still have a right of stopping the goods *in transitu*, but that right, as we shall see later on, is quite different from his right of lien. On the other hand, if the seller indorses a *dock warrant* or *delivery order*, or *warehouse-keeper's certificate* to the buyer, *until something more takes place*—viz., until the warehouseman actually delivers the goods, or consents to hold them for the buyer—they are, as a general rule, deemed still to remain *in the possession of the seller*, and he therefore *retains his lien* for the price.§

* *Currie* v. *Anderson* (1860), 2 Ellis & Ellis' Reports, 592.

† *Farina* v. *Home* (1846), 16 Meeson & Welsby's Reports, 119.

‡ *See* Sale of Goods Act, 1893, s. 39 (1) (*a*).

§ This rule is not invariable. For example, by the usage of the iron trade warrants for goods deliverable f.o.b. to A, or his assigns, by indorsement thereon, pass to a holder for value free from any seller's lien: *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D., 205.

Another important consequence of the difference between these various documents arises in cases of *bankruptcy*. If the seller becomes bankrupt, the question whether the goods are divisible among his creditors, will depend mainly upon whether they were in his possession, order or disposition, under such circumstances that he was the reputed owner.* This question will be discussed at length in my next Lecture, when it will be seen that its solution depends upon the kind of document which before the commencement of his bankruptcy the bankrupt has transferred or delivered to the holder.†

Now in drawing attention to some of the consequences of the difference between these various documents, most of the illustrations I have given are cases arising between buyer and seller. Directly you get a stage further, and a third party is introduced, this difference often ceases to operate; for example, if the seller continues after the sale in possession of any of such documents, and sells or pledges them to a person receiving them in good faith and without notice of the previous sale; or, if the buyer obtains with the seller's consent possession of such documents, and sells or pledges them to a person receiving them in good faith and without notice of any lien or other right of the original seller; or, if the sale or pledge of such documents is made by a mercantile agent in the ordinary course of business; then the transaction is governed by the Factors Act, and the difference between the different kinds of document disappears, for they are all *documents of title* for the purposes of that Act. It is only in some cases, therefore—for instance, if advances be made on the pledge of such documents by an agent who is not a "mercantile agent" as defined by that Act, or by a man who becomes bankrupt—that the difference between these various documents will have practical consequences to a banker making advances on such security; but as such cases not unfrequently arise it is necessary not to ignore the principles on which they turn.

Private Acts of Parliament of Dock Companies and Warehousemen.

One word more before passing away from this subject. I have referred to the legal principles which must prevail in cases not governed by the Factors Act, 1889, the Sale of Goods Act, 1893, and certain Private Acts of Parliament. Now these Private Acts have been passed of late years at the instance of certain Dock

* See Bankruptcy, Act, 1883, s 44, (iii).

† See Answers to Questions 10, 11 and 12, Lecture III, *post*, pp. 55-62.

Companies or firms of warehousemen enabling them to issue transferable certificates and warrants for the delivery of goods entitling the person named or the last indorsee to the goods specified therein. Some of these Acts provide that "the goods so specified "shall *for all purposes* be deemed to be *his property*";* while other Acts provide that such person "shall have the same right to "the possession and property of such goods *as if they were de-* "*posited in his own warehouse.*"† I will not trouble you with the precise effect of these enactments beyond pointing out that they seem to go much further than the provisions of the Factors Act, and that before advising on any case of advances made on the security of any warehouse-keeper's certificate or delivery warrant and not falling within the Factors Act, it would be necessary to ascertain whether the particular Dock Company or firm of warehousemen had obtained such a Private Act of Parliament or not.

Negotiability of Dock Warrants, etc.

One question with regard to the documents we have been considering remains to be answered:—Are they negotiable instruments? We have seen that in cases *not* governed by the Factors Act or one of the other Acts to which I have been referring, these documents are not regarded as documents of title at all, and in such cases it is clear that they are not negotiable either in the strict, or even in the wide, sense of the term. How far when the case is governed by the Factors Act, they are rendered negotiable by that Act will be considered presently.

General Rule of Law as to Transfer of Title to Goods.

Before coming to the provisions of the Factors Act, let me say a few words as to the general rules of our law with respect to the title to goods, and the circumstances under which possession will confer title.

The general rule of our law is that no one can transfer a better title than he himself possesses. According to the law maxim, *Nemo dat quod non habet.* To quote the words of Mr. Justice Blackburn: "At common law, a person in possession of goods "could not confer on another, either by sale or by pledge, any

* See *e.g.* The London and St. Katharine Docks Act, 1864, 27 and 28 Vict., c. clxxviii, ss. 106, 108.

† *See* Mr. A. T. Carter's Article on Dock Warrants, etc., *Law Quarterly Review*, 1892, Vol. 8, pp. 301, 303-304.

"better title to the goods than he himself had. To this general rule "there was an exception of sales in market overt, and an apparent "exception where the person in possession had a title defeasible "on account of fraud. But the general rule was that, to make "either a sale or a pledge valid against the owner of the goods "sold or pledged, it must be shown that the seller or pledger had "authority from the owner to sell or pledge, as the case might be. "If the owner of the goods had so acted as to clothe the seller or "pledger with apparent authority to sell or pledge, he was at common "law precluded, as against those who were induced *bonâ fide* to act "on the faith of that apparent authority, from denying that he "had given such an authority, and the result as to them was the "same as if he had really given it. But there was no such pre-"clusion as against those who had notice that the real authority "was limited."*

You will at once see the importance of considering this general rule of law that no one can transfer a better title than he himself possesses, and the necessity for ascertaining what are at the present day the exceptions to it; in other words, what are the circumstances under which the owner of goods will be deemed to have so acted as to clothe the seller or pledger with binding authority to sell or pledge; for until this is known it is unsafe to advance money on any such pledge, unless you know that the pledger either is in fact the owner, or has been actually authorized by the owner to pledge.

In the year 1743, the principle was laid down that though a factor had power to *sell* and thereby bind his principal, yet he could not bind or affect the property of the goods by *pledging* them as a security for his own debt;† and for many years this principle, although contrary to the law of all the other commercial nations of Europe, and although some eminent Judges expressed their disapproval of it, was acted on in our Courts. A hundred years ago, therefore, if a factor to secure his own debt pledged the goods of his principal to a pledgee who took them in good faith and without knowing that the borrower was not the true owner, the latter could recover them from the pledgee without repaying the loan.

History of the Factors Acts.

In 1823 an agitation was set on foot by London merchants, bankers, and brokers, with the view of obtaining an immediate

* *Cole* v. *North Western Bank* (1875). L.R. 10 C.P. at 362-363.

† *Paterson* v. *Tash* (1743), 2 Strange's Reports, 1178.

alteration of the law, and petitions were presented to Parliament with that object. A Committee of the House of Commons was appointed to investigate into the law and practice of trade on the subject both at home and abroad; a great number of witnesses were examined, including many of the leading London merchants, and most of the British vice-consuls and commercial representatives on the continent; and the Committee issued a report strongly urging upon the House the necessity, in the protection of commerce, of an immediate change in the law.*

This course was strenuously opposed by the legal members of the House, but in the same year, 1823, the first Factors Act was passed, and as its provisions were found not to afford sufficient protection, a second Act was passed in 1825, a third in 1842, and a fourth in 1877. It has been said that these Acts are "monu-"mental examples of bewildering legislation," and that the first three afford a model of the art of saying few things in many words; but as you are doubtless well acquainted with other excellent models of this art, and as all four Acts were repealed by the Factors Act, 1889, you will be content, I trust, to forbear exploring those treasuries of perplexing verbosity.

The Factors Act, 1889.

52 & 53 Vict., c. 45.

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.

It is necessary, however, to study attentively the Factors Act, 1889, for its provisions largely govern many important banking transactions, and I must ask you to examine in detail the various provisions of that Act.

Although called, like its predecessors, the "Factors Act" (s. 17), the word "factor" does not elsewhere occur in it, and its operation is, as we shall see, not confined to factors.

A *factor* is an agent employed to sell goods consigned or delivered to him by or for his principal for a compensation, commonly called factorage or commission.†

The Act, which consists of 17 sections, deals with dispositions by two classes of persons: I. Mercantile Agents as defined by s. 1—(ss. 2-7); II. Sellers and buyers of goods (ss.8-10). Sections 11-17 are supplemental.

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* This passage is taken from the late Mr. Pearson-Gee's work on the New Factors Act Annotated (1890), Introductory Chapter, pp. 5-6.

† Story on Agency, § 33.

Section 1 is preliminary. It contains certain definitions and is as follows:—

1. *Definitions.*—For the purposes of this Act—

(1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

There are several things to note with regard to this definition.

1. The agent, whose dispositions of goods are dealt with by sections 2-7 of the Act, must be a *mercantile* agent, *i.e.* an agent in a mercantile transaction.*

2. The agent must have authority in the customary course of his business as such agent to do one of four things:—

(i) to sell goods;

(ii) to consign goods for the purpose of sale;

(iii) to buy goods; or,

(iv) to raise money on the security of goods—the most usual mode of doing which is by pledging the documents of title to them.

3. The agent's authority may be *express*, *i.e.* actually conferred by the instructions of his principal; or *implied*, either from the course of former dealings between the same parties, or from the nature and scope of the agent's business. Thus, a *factor* has implied authority to sell or pledge goods, because the sale or pledging of goods is within the *ordinary scope* of his employment.

There are two extensive classes of mercantile agents known to lawyers, namely *factors*, who are intrusted with the possession as well as the disposal of property, and *brokers*, who are employed to contract about it, without being put in possession.† In the mercantile world both of these classes are known as *brokers*, and the term *factor* is not commonly used except in a limited sense in particular trades—such as corn-factors, coal-factors. In practice the business of broker and factor is often combined.

There is a class of brokers who are employed to raise money upon securities which are placed in their possession for that purpose. They act as intermediaries between bankers and others advancing money and borrowers, and are in the habit of lending money to their customers upon the securities which are deposited

* *Wood* v. *Rowcliffe* (1846), 6 Hare's Reports, 183.

† Smith's Mercantile Law, 10th ed., Vol. I, 118.

with them, and which they then pledge with the bankers who advance them the money.*

The effect of the definition of *mercantile agent* will be further considered later on when we come to speak of dispositions by mercantile agents.

The first section continues:—

(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

This definition, not being limited to mercantile agents, applies equally to the possession of other persons, such as sellers and buyers; in other words, it applies not only to sections 2 to 7, but also to sections 8 to 10.

(3.) The expression "goods" shall include wares and merchandise.

(4.) The expression "documents of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

This definition is taken (with the omission of India warrants which have become obsolete) from section 4 of the Factors Act, 1842. The Factors Act, 1825, section 2, included a *wharfinger's certificate*, which is omitted from the later Acts, but the omission appears to be of no consequence; for the words "used in the ordinary course "of business, etc.," (to the end of the clause) would seem to qualify all the documents mentioned. Thus, if a warehouse-keeper's certificate amounted merely to a statement that certain goods were in a particular warehouse, it is apprehended that such a certificate would not be a *document of title*. On the other hand, if a certificate authorized the holder to receive goods thereby represented, it would seem to be immaterial whether it were given by a warehouse-keeper or a wharfinger.

For this reason, the decision of the Lords Justices in the following case of *Gunn v. Bolckow* (1875)† respecting the certificates

* Pearson-Gee's New Factors Act, ed. 1890, 30-31.

† L.R., 10 Ch. Ap. 491.

of a *wharfinger* would, it is conceived, have been the same had certificates been issued in the same form by a *warehouse-keeper*. In that case, Bolckow & Co. of Middlesborough sold 4,000 tons of iron rails to the Aberdare Iron Co. for £32,000 to be delivered at a seaport town in Russia by written contracts stipulating thus: "Payment to be made by buyers' acceptance of sellers' drafts at "six months' date against inspector's certificate of approval and "wharfinger's certificate of each 500 tons being stacked ready for "shipment." Under these contracts the sellers began to manufacture rails, which when made were stacked at their works, and the inspector's and wharfinger's certificates were delivered to the buyers from time to time in exchange for their acceptances of seller's drafts. The wharfinger's certificates were in the following form:—"I certify that there are lying at the works of Messrs. "Bolckow & Co. 500 tons of iron rails which are ready for ship-"ment. (Signed) W. Roe, Wharfinger." The buyers subsequently obtained advances, amounting to £28,000 in all, from the Plaintiff on handing to him the certificates with a memorandum stating that it had been arranged that he should make the advances against "warrants" for the iron. The buyers having become insolvent, and their acceptances having been dishonoured, the Plaintiff claimed that by virtue of holding these alleged "warrants"—*i.e.* the wharfinger's certificates—he had a lien on the rails which were still in the actual possession of the sellers in priority to their lien, in other words, that he was equitable mortgagee by deposit of documents of title to the goods. The Court held that these certificates were not warrants, and therefore that the Plaintiff who had advanced the money could claim no priority to the vendor's lien.

Persons, said Lord Justice James, "may lend money as much "as they like, but that cannot alter the nature of the documents. "No practice of the persons who have got those certificates and "money lenders, as between them, would in any way affect the "manufacturer, unless you can show the manufacturer has in some "way authorized something to be done."* Mellish, L.J., with reference to the wharfinger's certificate said: "It professes simply "to be what it is, a certificate that those tons are ready for ship-"ment. It is merely a security to the buyer that such things are "actually there. . . . It is utterly impossible . . . to "make that out to be a document of title. A document of title is "something which represents the goods, and from which, either "immediately or at some future time, the possession of the goods "may be obtained. . . . The vendor, having agreed by his "contract that he would give the wharfinger's certificate in order

* *Ibid.*, at 499, 500.

"that the purchaser may have evidence that the goods have been "actually made, and now are actually ready to be shipped, cannot "help giving the certificate; and how the fact of his giving that "certificate, which does not profess to be negotiable, and "does not profess to require the delivery of the goods "to order or to bearer, or anything of the kind, can affect "his lien as vendor, merely because the purchaser chooses to "borrow money on the faith of it, I am at a loss to conceive."*

The case of *Kemp v. Falk*,† decided in 1882, in like manner shows that wide as is the definition of *document of title* given by section 4 of the Act of 1842, and re-enacted by section 1 (4) of the Act of 1889, it is necessary in any case of doubt to see whether an alleged document of title comes within its terms. In that case, the holders of a bill of lading for a cargo of salt wrote to the captain of the ship saying that in order to save trouble they would not sign delivery orders, but that they had written to their accountant on board the ship to deliver the salt to persons producing *cash receipts* from their cashier; and it was held that such a receipt was not equivalent to a delivery order, nor was it a document of title at all, and consequently the indorsement of it did not put an end to the seller's right of stoppage *in transitu*.‡ It is clear that a mere cash receipt is not a "document used in the ordinary "course of business as proof of the possession or control of goods," nor does it on its face authorize or purport to authorize its possessor "to transfer or receive goods thereby represented."

By the Sale of Goods Act, 1893, section 62 (1), *document of title to goods* has the same meaning in that as in this Act, unless the context or subject-matter otherwise requires.

The mode of transferring documents is either by indorsement or by delivery: see section 11.§

The next definition is this:—

(5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability.

The terms of this definition are wide enough to include some forms of security which are not pledges in the true sense. Thus, a mortgage, whereby in consideration of a loan the general property in goods is conditionally transferred; or a letter hypothecating or charging goods, would appear to be a "pledge" within its terms.

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* *Ibid.*, at 502, 503.

† 7 A.C. 573, H.L.

‡ *See per* Lord Blackburn, *ibid.*, at 585.

§ Printed in Lecture III *post* p. 77.

This definition will be further considered when we come to section 3. *

(6.) The expression "person" shall include any body of persons corporate or unincorporate.

The consideration of the remaining sections of the Act must be reserved for my next Lecture.

Note on Negotiable Instruments.

In the first of these Lectures it was stated† that there were two main requisites of a negotiable instrument in the strict sense:—

1. It must be transferable by mere delivery, or by indorsement and delivery (according to whether it is made payable to bearer, or to order) so that the property in it shall pass to the transferee free from any defect of title of the transferor or of any prior holder.

2. The holder must be able to sue on it in his own name.

After that Lecture had been published, my attention was called to some observations of Judge Willis in his Lectures on the Law of Negotiable Securities, where he lays much stress on the statement that an instrument *cannot be negotiable* unless it is "in such "a state that the true owner could transfer the contract or engage-"ment contained therein by simple delivery of the instrument";‡ and his definition of negotiable instruments§ would exclude bills of exchange, promissory notes, and cheques made *payable to order* unless they had been indorsed in blank. With great deference to the learned Judge's opinion, I venture to think that this places too narrow a limit on the meaning of *negotiable instrument*, by regarding indorsement as essential to the negotiability of an instrument rather than as concerned merely with the proper mode of negotiating it.

There is very high judicial authority for treating such documents as *negotiable*, whether indorsed or unindorsed, although the former, like a bill drawn payable to bearer, can be negotiated by delivery, while to negotiate the latter requires indorsement as well as delivery. His Honour cites‖ *Whistler v. Forster*¶ in support of his view; but in that case Erle, C.J., said:** "According to the law

* See Lecture III, *post*, p. 69. † *See* Lecture I, *ante*, p. 7.

‡ 2nd ed., 6. § *Ibid.*

‖ Law of Negotiable Securities, 2nd ed., pp. 8, 38.

¶ (1863) 14 Common Bench Rep., New Series, 248.

** At 256.

"merchant the title to a negotiable instrument passes by indorse-"ment and delivery." And Willes, J., referring to the rule of the law merchant as to negotiable instruments, said:* "In order to "acquire the benefit of this rule, the holder of the bill must, if it "be payable to order, obtain an indorsement." And Keating, J., said:† "The right to sue in a court of law upon a negotiable in-"strument is not complete without a written indorsement." So, in *Crouch v. Crédit Foncier*,‡ cited by Judge Willis,§ Blackburn, J. said: "Bills of exchange and promissory notes, whether payable "to order or to bearer, are by the law merchant negotiable in both "senses of the word. The person who, by a genuine indorsement, "*or*, where it is payable to bearer, by a delivery, becomes holder, "may sue in his own name on the contract, and if he is a bonâ fide "holder for value, he has a good title notwithstanding any defect "of title in the party (whether indorser *or* deliverer) from whom "he took it."

For these reasons I have not deemed it necessary to modify the definition which I gave.

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* At 258. † At 259.

‡ (1874) L.R. 8 Q.B. 374; *see* at p. 382.

§ Law of Negotiable Securities, 2nd ed., 38.

LECTURE III.

SUMMARY OF LECTURE II. ANSWERS TO QUESTIONS:—RIGHTS OF HOLDERS OF BILLS OF LADING, WARRANTS OF WAREHOUSEMEN AND WHARFINGERS, WARRANTS AND DELIVERY ORDERS IN RELATION TO BANKRUPTCY, CUSTOM OF TRADE IN RELATION TO BANKRUPTCY, WHAT CASES FALL UNDER THE FACTORS ACT. THE FACTORS ACT, 1889 (Continued):—DISPOSITIONS BY MERCANTILE AGENTS, AND BY SELLERS AND BUYERS; SUPPLEMENTAL.

Summary of Lecture II.

IN my last Lecture, I endeavoured to throw some light upon dock warrants, delivery orders, warehouse-keepers' certificates and similar documents, and it was seen that, apart from the Factors Act, the Sale of Goods Act, and certain Private Acts of Parliament, those documents are not generally regarded in law as documents of title, for the reason that, when once the goods are landed, actual possession can be taken of them at any time—a reason not applicable to bills of lading, which deal with goods at sea, of which, therefore, so long as they are at sea, it is physically impossible for the consignee to take possession. I also explained the usual practice in obtaining delivery of goods from a warehouse. I showed the important consequences resulting from the difference between bills of lading and those other documents with reference to the Statute of Frauds, and to the seller's lien, while a further distinction between some of them has to be made with respect to the reputed ownership clause of the Bankruptcy Act; and that these differences in many cases cease to operate under the Factors Act, the Sale of Goods Act, and under certain Private Acts, the latter of which authorize the issue of documents giving special

rights to the person named, or the last indorsee. We saw that the ordinary rule of law is that no person can transfer a better title than he himself possesses, so that no agent can give a valid title to goods except under the actual or ostensible authority of the owner; and with regard to ostensible authority that at common law a factor has no authority to pledge goods, and that the Factors Acts, 1823–1889, had been passed to modify this rule of our law, the last Act repealing the four previous Acts. After defining the term factor, and noting the distinction between factors and brokers, we examined in detail the definitions contained in section 1 of the Act of 1889, and saw that the definition of document of title, though wide, did not include a certificate not purporting to be negotiable and merely stating that goods were ready for shipment, or a mere receipt for cash.

Answers to Questions.

Since delivering my last Lecture, a number of questions have been sent to me with reference to the matters discussed in that and in my first Lecture, and I purpose dealing with these before returning to the Factors Act.

Rights of Holders of Bills of Lading.

The first set of questions refers to the case of *Glyn & Co. v. East and West India Dock Co.*,* which was discussed at some length in my first Lecture, and I will deal with these first. You will remember that in that case the bankers had advanced money to the consignees, on the security of *one* bill of lading, indorsed in blank, of a set of three, and the bankers not having put a stop on the consignment, the Dock Company in good faith delivered the goods to the consignees upon their presenting the second bill of the set unindorsed; and it was held that the Dock Company were justified in so acting. The questions are put thus:—

1. Plaintiffs could not recover from the Dock Company, as they did not put a stop on the consignment; but were they not entitled to recover from their client, the consignee, although of course their security as represented by the bill of lading would be valueless?

My answer is: Yes, certainly; and the *value* of their right to sue the consignees would bear an exact relation to the means of the latter to meet their liabilities.

2. Would not the delivering, or indorsing and delivering, by the consignee of the different bills of lading comprising the set to different transferees be an act of fraud?

* (1882), 7 A.C. 591; Lecture I, *ante*, pp. 17-19.

I answer: Yes, undoubtedly; and the consignees would be liable for such act in either civil or criminal proceedings.

3. Can a banker repudiate all the contracts contained in a bill of lading, if it is merely hypothecated to the extent of overdraft; and may he, in the event of notice of intention to sell the goods being given to the hypothecator, take upon himself to realize such portion of the goods as will produce sufficient to liquidate to full amount of debt owing?

My answer is: A banker to whom an indorsed bill of lading has been pledged by way of security, can, on failure of the pledgor to pay off the advance at the proper time, realize his security. He can therefore claim delivery of the goods. But he cannot repudiate the contract evidenced by the bill of lading. On the contrary, he will not be able to obtain the goods without first satisfying the claim for freight and other charges payable under the bill of lading, and also charges for warehousing, if these have been properly incurred; for, as we have seen, neither the master nor the warehouse-keeper can be compelled to give up their lien and deliver the goods until all their proper charges are paid. Having obtained delivery he can then sell the goods, or such portion as will satisfy his claim, handing the balance (if any) to the pledgor.

4. If the banker disposes of all or a portion of the goods to recoup himself, does he thereby become a transferee, and become liable under all contracts relating to the bill of lading?

This question raises a difficult point of law, which has never yet been definitely decided. In the case of *Burdick v. Sewell** Lord Selborne, indeed, suggested that the indorsee by way of security, though he has not *the* property passed to him absolutely, "has a "title by means of which he is enabled to take the position of full "proprietor upon himself, with its corresponding burdens, if he "thinks fit; and that he actually does so as between himself and "the shipowner, if and when he claims and takes delivery of the "goods by virtue of that title." But that view was not adopted by any other of the learned Lords, nor does it appear to be supported by any decided case,† and with great deference to the high authority of Lord Selborne, I venture to express the gravest doubt whether that view, which was not necessary to the decision, would be upheld. The point, however, seems to be technical rather than of great practical importance; for, as regards *liabilities*, the banker, as I have just said, cannot obtain the goods without paying freight and all proper charges; and as regards *rights of suit*, an action would clearly lie against the shipowner for any breach of

* (1884), 10 A.C. at 86.

† See this discussed by Mr. Carver in Law Quarterly Review, 1890, Vol. 6, p. 294.

contract or of his duty as a carrier, and the point would generally merely resolve itself into an enquiry as to the proper form of action, and as to the party in whose name the action ought to be brought.

5. The fifth paragraph, which refers to the two preceding questions, is as follows:—If no liability is incurred in cases 3 and 4, a banker should never become absolute transferee of a bill of lading, as it is most undesirable for him to be in such a position that under certain circumstances he may find a cargo of merchandise on his hands with various conditions attaching thereto.

This seems to be rather in the nature of an observation than of a question, but if the writer intends to ask whether there is any means whereby the pledgee of a bill of lading can obtain the *advantages* of an indorsee without rendering himself subject to his *liabilities*, I should answer: No. As already pointed out, the pledgee cannot compel delivery of the goods until he has paid the charges due, and even if he has obtained delivery, a contract to pay the charges will usually be implied.*

6. The next question comes from another source, and is as follows:—Has a seller a lien on goods when he has parted with the bill of lading not indorsed to the buyer but only to order?

If the bill of lading is made to the seller's order, and has been indorsed by him *in blank*, and not *in full*—*i.e.* not specially to the buyer—the seller on parting with the bill has in this case also lost his lien; for there is no distinction in this respect between these two kinds of indorsement.†

7. Another question, which was put to me verbally was this:—Supposing that while goods are still on board ship, the freight is paid; does this put an end to the bill of lading, so that it becomes exhausted?

The answer is: No. The master's contract under the bill of lading is not fulfilled until he delivers the goods. It is conceivable, though very improbable, that he might make a special agreement to hold them for a time in his ship as in a warehouse,‡ but in the absence of such an agreement, the bill of lading remains unexhausted not only until the freight is paid, but until the goods are duly delivered either to the holder of the bill of lading or to a wharfinger or warehouseman.

8. The next question asked has reference to the illustration which I gave in my first Lecture of the want of strict negotiability

* See Lecture I, *ante*, p. 11.

† *Lickbarrow* v. *Mason* (1793), 1 Smith's Leading Cases, 7th ed. 756; 10th ed. 674.

‡ The possibility of such an agreement is discussed by Lord Blackburn in *Kemp v. Falk* (1882), 7 A. C., at 584.

in the case of bills of lading. I gave the instance of an indorser, as in *Meyerstein v. Barber*,* having already indorsed for value one bill of a set, indorsing a second to another indorsee, when the title of the latter would be subject to the indorser's defect of title; and I was asked: Would not the same rule apply to a bill of exchange drawn in a set? And if so, how did my illustration show that a bill of lading was in any degree less negotiable than a bill of exchange? The illustration I gave was perhaps not a very happy one, but I do not think that a bill of exchange drawn in a set is governed by the same rules. The rules applicable to such a bill of exchange are laid down in section 71 of the Bills of Exchange Act, 1882. It would take me too far afield to examine those rules in detail, but although there may be some resemblance between such a bill of exchange and a bill of lading, inasmuch as, where two or more parts of a bill of exchange drawn in a set "are negotiated to "different holders in due course, the holder whose title first "accrues is as between such holders deemed the true owner of "the bill";† yet there is this broad distinction:—that *each bill of lading* of a set is as a matter of course signed by the master or person primarily liable, whereas where a *bill of exchange* is drawn in a set, the drawee, who by accepting becomes the person primarily liable, should write his acceptance on *one* part only, and "if the drawee accepts more than one part, and such accepted "parts get into the hands of different holders in due course, he "is liable on every such part as if it were a separate bill";‡ and if a holder "indorses two or more parts to different persons, he is "liable on every such part."§ The master or shipowner, on the other hand, is of course not liable to each of the different holders of bills of lading of the same set, but only to one of them—generally to that holder who was first in having one of the set transferred to him for value and in good faith on his part.

Warrants of Warehousemen and Wharfingers.

I have also been asked the following set of questions‖ as to the negotiability of such warehousemen and wharfingers' warrants as have not been made subject to Private Acts of Parliament.

9. Whether warrants for goods, issued by London warehousekeepers and wharfingers, and duly indorsed, may be considered negotiable in the sense that the property in the goods they represent passes to the banker or other holder?

My answer is: In the case of such a warrant, as in that of a bill

* (1870) L.R. 4 H.L. 317. † S. 71 (3). ‡ S. 71 (4). § S. 71 (2).
‖ Numbered 9, 10 and 12.

of lading,* *the* property in the goods—*i.e.* the *whole* property—will not in any case pass where the warrant is merely pledged to the banker as a security, but only a *special* property, the *general* property remaining in the pledgor.

Moreover, if the pledgor has pledged them fraudulently and is neither the owner of the goods, nor an agent having authority, actual or ostensible, from the owner to pledge them, nor a seller or buyer acting in such a manner as to come within sections 8 to 10 of the Factors Act, no property whatever will pass to the banker, and he will be made to restore the goods or their value to the owner. Whether an agent has ostensible authority or not will depend mainly upon the Factors Act, but not entirely; for if the owner has by his conduct enabled another person to hold himself out as the owner, or as entitled to dispose of the goods, and the latter has sold or pledged them to an innocent party, the owner who has enabled the transaction to be carried out is estopped from disputing the ostensible authority of that person to sell or pledge, and must himself bear the loss.†

Warrants and Delivery Orders in Relation to Bankruptcy.

The next question is this:—

10. Whether, in the event of the bankruptcy of the party in whose name the warrant was originally issued, and in whose name the goods presumably stand in the books of the warehouse-keeper, the possession of the warrant by a banker or other pledgee would be good as against the trustee in bankruptcy, and would have the effect of taking the goods out of the order and disposition of the bankrupt?

Before giving an answer to this question, I will mention one coming from another source, raising a similar point, and will then deal with both questions togther. It is as follows:—

11. Supposing A., a factor, is given possession of the documents of title to goods with the consent of B., the owner, in order that he may sell them, and A. pledges these documents with his banker to secure an advance; what is the result if either A. or B. becomes bankrupt? Does such bankruptcy affect the rights of the banker?

These questions raise for our consideration points of serious importance which do not appear to be very satisfactorily or adequately treated in the text books, nor are the decisions on these points always easy to reconcile. The questions do not admit of

* As to which, see *Burdick* v. *Sewell* (1884), 10 A.C. 74, set out in Lecture I, *ante*, pp. 13-14.

† See *e.g. Farquharson* v. *King* (1901), 2 K.B. 697, C.A.; and *cf. Henderson* v. *Williams* (1895) 1 Q.B. 521, C.A.

short answers, and having regard to their great importance, I propose to deal with them at some length.

The solution of these questions mainly turns upon the reputed ownership clause, now contained in section 44 of the Bankruptcy Act, 1883.* That section provides that the property of the bankrupt divisible amongst his creditors (which by section 54 vests in the trustee) shall *not* comprise:

(1) Property held by the bankrupt on trust for any other person.

And it goes on to enact that it shall comprise (among other things) the following:—

(iii) All goods being, at the commencement of the bankruptcy, in the *possession, order or disposition* of the bankrupt, in his trade or business, by the *consent* and permission of the true owner, under such circumstances that he is the *reputed owner* thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.

Goods in the hands of a factor are held *on trust* within the meaning of this section, and therefore in the event of his bankruptcy they are not divisible amongst his creditors.† It is true that if the factor is, with the consent of his principals, held out to the public as the owner of the goods—as, for instance, if they are really carrying on their trade in his name—they will not be allowed to set up that he was merely a factor;‡ but, otherwise, if the fact of the relation of principal and factor is clearly established, there is no doubt that the order and disposition clause does not apply.§

Even where goods consigned to a factor have been sold by him and the proceeds paid into his bank, and he becomes bankrupt,

* The reputed ownership clause was originally contained in the Act 21 James I, c. 19, s. 11, passed in 1623, the terms being very similar in that and later Bankruptcy Acts to those of the present enactment. The Act of James, however, spoke of "possession, order *and* disposition," and that Act was repealed by 5 George IV, c. 98, s. 1, s. 70 of which changed the phrase into "possession, order *or* disposition"—the phrase which was repeated in 6 George IV, c. 16, s. 72, and in later Acts down to the present Act of 1883.

† *Godfrey* v. *Furzo* (1733), 3 Peere Williams' Rep. 185; Ex parte *Dumas* (1754), 1 Atkyns' Rep. 234; 2 Vesey, Senior's, Rep. 582; and see Robson on Bankruptcy, 7th ed. 537.

‡ Ex parte *Buck*. Re *Fawcus* (1876), 3 Ch. D. 795; *cf.* Ex parte *Bright*. Re *Smith* (1879), 10 Ch. D. 566, C. A.

§ *Per* Bacon, C. J. in Bankruptcy, in Ex parte *Buck* (1876), 3 Ch. D. at 800; *cf. per* Dallas, J., in *Gibson* v. *Bray* (1817), 8 Taunton's Rep. at 80.

those proceeds can be followed, and will not pass to his trustee,* except to the extent of any lien which the factor may have had,† unless the principal has agreed to treat the factor as a *mere debtor*, and not as acting in a fiduciary relation towards him.‡

Having, then, disposed of the ordinary case of goods in the hands of a factor, which do not fall within the reputed ownership clause on the ground that they are held by him on trust, let us see what other questions have to be considered in order to decide whether goods were in "the possession, order or disposition of the "bankrupt" by the consent of the "true owner."

One of the first questions to determine is:—Who is to be deemed the *true owner?* If the original owner becomes bankrupt and the goods are in his own possession, order and disposition, the case does not fall within the reputed ownership clause at all, for that has always been construed to apply only to the possession of the goods of *another* with the consent of the true owner.§ The goods in such a case would be divisible amongst his creditors like any other property belonging to him.‖

But if, as in the cases put in the above questions 10 and 11, the goods are in a warehouse, and the warrant for them has been lodged as security with a banker, or other pledgee, the authorities show that it is the banker, or other pledgee or mortgagee, and *not* either the pledgor, or (where pledged by a factor) his principal, who is deemed to be the *true owner* within the meaning of the reputed ownership clause.¶

Let us suppose, then, that a warrant for goods has been pledged to a banker, either by B., the original owner of the goods, or by A., the factor to whom B. has intrusted the goods or the warrant. If A. becomes bankrupt, it is, as has been seen, immaterial whether the goods are deemed to be in his possession or not, for *ex hypothesi* they can only be in his possession as factor, and therefore on trust. But if B. becomes bankrupt, the question for decision is whether in the circumstances of each particular case the

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* Ex parte *Cooke*. In re *Strachan* (1876), 4 Ch. D. 123, C.A.; In re *Hallett's Estate* (1879), 13 Ch. D. 696, C. A; *Hancock* v. *Smith* (1889), 41 Ch. D. 456, C. A.

† See *Drinkwater* v. *Goodwin* (1775), 1 Cowper's Rep. 251, at 255, 256; and Ex parte *Buck*. Re *Fawcus* (1876), L. R. 3 Ch. D. 795.

‡ See Ex parte *White*. Re *Nevill* (1871), L. R. 6 Ch. Ap. 397.

§ *Joy* v. *Campbell* (1804), 1 Schoales & Lefroy's Rep. 328, at 336; and see the long list of cases cited in Griffith & Holmes on Bankruptcy (1867), Vol. 1, p. 450, note (*h*).

‖ Under s. 44 (i) of the Bankruptcy Act, 1883.

¶ *Ryall* v. *Rowles* (1750), White & Tudor's Leading Cases in Equity, 4th ed. Vol. 2, 734; 7th ed. Vol. 1, 96; *Lucas* v. *Dorrien* (1817), 7 Taunton's Rep., at 292–293; *Burn* v. *Carvalho* (1839), 4 Mylne & Craig's Rep. 690, at 704.

goods at the commencement of B.'s bankruptcy were or were not in his possession, order or disposition by the banker's consent under such circumstances that B. is the reputed owner?

Now it has been stated by a very learned author* that, generally, where goods are not in the custody of the bankrupt, the indorsement and delivery of a delivery order, dock warrant, or document of title other than a bill of lading, are not sufficient to determine the possession of the bankrupt, unless notice be given to the agent having custody on behalf of the bankrupt, and he attorns to the true owner.

But it is submitted that the various documents here referred to do not all stand on the same footing, and however true the proposition may be of a *delivery order*, which may be issued and subsequently withdrawn or countermanded by the owner of the goods without the knowledge of the warehouseman or wharfinger, the rule does not equally apply to a transferable *warrant* issued by the warehouseman or wharfinger, who, according to the custom of the trade, will not part with the goods except on production of the warrant.

Accordingly, in the case of *Greening v. Clark*,† where the original owner sold goods lying in the East India Company's warehouses, but retained the Company's warrants (which were shown to be current in the market and transferable without indorsement) and pledged them, and became bankrupt, although no notice either of the sale or the pledge was given to the warehouse-keepers, it was held that the goods were not in the bankrupt's possession within the reputed ownership clause, nor could he have obtained possession without repaying the money advanced; and that the buyer was entitled to the goods.‡

This decision was followed and approved in several later cases,§ and was said to be "not only good law but also sound sense, and "in accordance with other judgments on the subject."‖ And in one case, the decision was relied upon as showing "that goods pledged

* Lord Justice Vaughan Williams in his work on Bankruptcy, 6th ed. 199; 7th ed. 214.

† (1825), 4 Barnewall and Cresswell's Rep. 316.

‡ In this case the advance had in fact been satisfied out of other moneys, but before the Factors Act of 1877 this would not have affected the buyer's right to recover the warrants from the pledgee without re-imbursing him. See now s. 8 of the present Factors Act, and *cf. Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C.P.D. 32, cited in commenting on s. 8, *infra*.

§ Ex parte *Taylor*. Re *Campbell* (1831), Montagu's Rep. in Bankruptcy 240, at 243; *Webb* v. *Whinney* (1868), 18 Law Times Rep. 523; *Lincoln Waggon Co.* v. *Mumford*, 1880, 41 Law Times Rep. 655.

‖ *Per* Willes, J., in *Webb* v. *Whinney*, 18 Law Times Rep., at 525.

"by a bankrupt cannot be said to be in the order and disposition of "such bankrupt."*

Moreover, even if in such a case the bankrupt were to be deemed to have had legal possession, how could he have been the *reputed owner?* He could neither have borrowed money on the goods elsewhere, nor have sold them, without producing the warrants, which were already pledged.†

It is conceived, then, that although the indorsement and delivery by the holder of such a warrant are not sufficient for some purposes to determine his possession, unless the assignee takes actual possession of the goods or gets the warehouseman to attorn to him,‡ such indorsement and delivery to a pledgee by one who afterwards becomes bankrupt are sufficient to take the goods out of his possession within the meaning of the reputed ownership clause. Moreover, it must not be forgotten that much more than *mere possession* of the goods by the bankrupt is required to bring them within that enactment.§

For these reasons the answer to question 10 should in my opinion be in the affirmative: that the possession of the warrant by a banker or other pledgee would be good as against the trustee, and would take the goods out of the order and disposition clause;

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* *Per* Stephen, J., in *Lincoln Waggon Co.* v. *Mumford*, 41 Law Times Rep., at 659.

Ex parte *Roy*. Re *Sillence* (1877), 7 Ch. D. 70, seems very difficult to reconcile with these authorities. In that case a horsedealer was paid by a customer £170 for a pair of horses, which she returned with his consent, he supplying her with another pair (which he was authorized as agent to sell but not to pledge) for her use until he could find her a suitable pair; he then became bankrupt. Bacon, C. J. in Bankruptcy, held that the horses so supplied were in the order and disposition of the bankrupt. It is submitted that this decision conflicts with the principle of those above cited, and also with the long string of cases decided before the first Factors Act (none of which were referred to), in which it was held that where a factor (who at that date had authority to sell but not to pledge) pledged goods to secure an advance, the pledgee had no right to retain the goods against the factor's principal. It was never held in those cases, when the factor became bankrupt, that the goods were within the reputed ownership clause: see *e.g.* *Martini* v. *Coles* (1813), 1 Maule and Selwyn's Rep. 140; *Gill* v. *Kymer* (1821), 5 Moore's Rep. 503. The fact in Ex parte *Roy* that the horsedealer had not possession nor the right to possession of the horses except upon supplying the customer with a suitable pair or repaying her her money, would, according to the authority of *Webb* v. *Whinney*, and *Lincoln Waggon Co.* v. *Mumford*, have taken the property out of his possession, order or disposition. In all these cases the pledge by the debtor was tortious.

† See *per* Dallas, J., in *Lucas* v. *Dorrien* (1817), 7 Taunton's Rep., at 290, and *per* Park, J., *ibid.*, at 291.

‡ See *e.g.* *Farina* v. *Home* (1846), 16 Meeson and Welsby's Rep. at 123; *Castle* v. *Sworder* (1861), 6 Hurlstone and Norman's Rep. 828, 838.

§ See *per* Dallas, J., in *Gibson* v. *Bray* (1817), 8 Taunton's Rep., at 79–80; *cf.* Pollock on Possession, 69.

and the answer to question 11 should be in the negative: that the bankruptcy of either A., the factor, or B., his principal, would not affect the rights of the banker.

At the same time these arguments are not applicable in the case of a delivery order, issued by the owner of the goods himself; for until this latter is presented to the warehouseman or wharfinger, and he attorns to the holder, the goods remain in the possession, order and disposition of the original owner, who still has it in his power to countermand his first order, or to issue a second order in favour of himself or of another assignee.*

Thus, in the case of *Arbouin v. Williams*,† a trader, having goods lying at certain wharves, and entered in his own name, signed delivery orders directing the wharfingers to deliver them to [blank] or bearer, and deposited these at his bank to secure advances; and the bankers, having filled up the blanks in their own name, delivered them to the wharfingers, who transferred the goods in their books into the name of the bankers, who after the trader's bankruptcy took possession of the goods. The action was brought by the trader's assignees in bankruptcy against the bankers for conversion of the goods, and it being doubtful on the evidence whether the whole or only part of the goods was transferred into the bankers' name in the wharfingers' books *before* the day on which the trader committed the act of bankruptcy, Lord Gifford, C.J., directed the jury that with respect to the goods so transferred before that day the verdict must be for the defendants, but that if they found that any of the goods were standing in the bankrupt's name on that day, these would fall within the reputed ownership clause, and with respect to them they must find for the plaintiffs.

Custom of Trade in Relation to Bankruptcy.

The last of the set of questions we are discussing is this:—

12. If the holder's (*i.e.* the pledgee's) claim to the goods under such circumstances (as are mentioned in question 10) were based on mercantile custom, would it be necessary, in order to establish such claim, for the holder to show that the custom was a general one? For example, the usage of Liverpool bankers differs from that of London bankers. A London banker holds warehouse-keepers' warrants, whilst a Liverpool banker has the goods transferred into his name in the books of the warehouse-keeper. Would this diversity of practice defeat the plea of mercantile custom?

* For instances where a second delivery order has been issued, see *McEwan v. Smith* (1849), 2 House of Lords Cases, 309; and *Imperial Bank v. London and St. Katharine Docks Co.* (1877), L.R. 5 Ch. D. 195.

† (1824), Ryan & Moody's Rep. 72.

For the reasons already given, the pledgee of a warehouse-keeper's warrant would, in my opinion, have a good claim, and he need not prove any custom.

If the security given to a banker was not such a warrant, but merely a delivery order signed by the pledgor, then, as has been seen,* in the event of the pledgor's bankruptcy, the banker will not have a good claim, unless the warehouseman has attorned to him.

It is difficult to see how a custom of *bankers* could affect the question one way or another. At the same time if it were material, a custom of trade need not be uniform, and a custom might be proved to prevail among Liverpool bankers, although it did not among London bankers.

In some cases a custom of the trade of the *bankrupt* may be material. For instance, let us suppose a case where a wine merchant purchases from a spirit merchant at Liverpool certain butts of whiskey, stored in a bonded warehouse belonging to a firm of warehousemen, and the seller transfers the whiskey in his books into the name of the buyer, and makes out and signs a delivery order, which he hands to the buyer, who pledges it with his banker, no notice being given to the warehousemen of either the sale or the pledge, and the whiskey remaining in the warehouse in the seller's name until after he becomes bankrupt. In the absence of any evidence of a custom of trade, the whiskey would be deemed to be in the possession, order or disposition of the seller by the consent first of the buyer, and afterwards of the banker, under such circumstances that the seller was the reputed owner. If, however, upon the trustee in bankruptcy claiming the goods as having been in the seller's reputed ownership, the banker proved that it was the usual custom of the wine and spirit trade in Liverpool for goods sold in bond to remain in the possession or under the control of the vendors, in the bonded warehouse in which they were at the time of sale, until they were required by the purchaser for use; the existence of this custom would exclude the doctrine of reputed ownership, and the trustee's claim would thereby be defeated.

Considerable light may be thrown upon this subject by a careful comparison of three cases, eventually decided by the Lords Justices on appeal, which arose on the bankruptcy in 1872 of Couston and Co., a firm of spirit merchants, who had sold various quantities of whiskey to different wine merchants.† In each case the whiskey

* *Arbouin* v. *Williams* (1824), Ryan & Moody's Rep. 7½, set out *supra*.

† Re *Couston*. Ex parte *Ward* (1872), L.R. 8 Ch. Ap. 144; Ex parte *Watkins* (1873), *ibid.* 520; Ex parte *Vaux* (1874), L.R. 9 Ch. Ap. 602. As to how far a custom of trade must be known in order to exclude reputed ownership, see the judgments in Ex parte *Watkins*, and *cf.* Re *Goetz* (1898) 1 Q.B. 787, C.A.

had been bought and paid for, but had not been removed before the sellers' bankruptcy from the bonded warehouses where it was stored at the time of sale, and the buyer applied for an order against Coustons' trustee for the quantity bought, and proved the above mentioned custom.

In *Ward's Case*, the eight hogsheads bought were lying in a dock Company's warehouse to the order of Coustons, though transferred at the time of sale in Coustons' books into Ward's name. Before the bankruptcy Ward had directed Coustons to forward to him *one* of the hogsheads—thereby terminating his *consent* to the bankrupts' possession of that one. The order was refused for the seven hogsheads, but granted for the one, and on the trustee appealing as to the one, the order was affirmed.

In *Watkins' Case*, the whiskey bought consisted of two hogsheads stored in the warehouse of a third party, and three butts and four quarter-casks lying in a warehouse rented by Coustons, the sellers, who at the time of sale transferred in their books both lots into Watkins' name, and gave him delivery orders for the two hogsheads, and *as warehouse-keepers* a warrant for the second lot. Before the bankruptcy Watkins requested the four quarter-casks to be sent to him, and although this was not done then, the trustee (acting on the decision in *Ward's Case*) gave these up to him, but refused to give up the remainder. He was ordered to deliver the three butts, but not the two hogsheads, and on the trustee appealing as to the butts, the order was affirmed.

In *Vaux's Case*, the whiskey bought was in the warehouse of other warehouse-keepers, and no warrant was obtained from them, nor notice of the sale given them, nor had Coustons given Vaux, the buyer, any delivery order, yet *by virtue of the custom* it was held that the whiskey was not after the sale in the sellers' reputed ownership, and that Vaux was therefore entitled to it as against the trustee.

In the latter case the custom was all important; and it is apprehended that this decision shows:—

1. That both Ward and Watkins should have appealed (instead of the *trustee* appealing); for each buyer was entitled to all that he had bought on proving the custom, which took the whiskey out of the sellers' reputed ownership.

2. That Ward and Watkins were each entitled to *what he obtained* without proof of the custom, on the ground that independently of the custom it had been taken out of the reputed ownership clause: Ward, because he had demanded it before bankruptcy, and Watkins because he held the sellers' warrant as warehouse-keepers.

What Cases fall under the Factors Act.

13. At the close of my lecture, a gentleman put to me this question: How can we tell whether a case is governed by the Factors Act or not? That seemed to me a very practical question to ask, and the answer I am endeavouring to give in what I am saying to you about the Factors Act. But will that gentleman pardon me for saying that the only way of answering it is to consider whether the facts of any individual case do or do not bring it within the protection of that Act? It is impossible to find any short and simple answer to the question. I can suggest no royal road to this learning. Were such a road discoverable, questions of law would be much simpler than they are, and instead of having to go through the tedious and expensive process under which the lay world at present groans and travails, we should be nearing a millennium where the necessity for a legal profession would cease to exist, and every man might by obtaining a small book become his own complete lawyer. Pending the arrival of that happy time, I propose to return to the prosaic details of the Factors Act, 1889.

The Factors Act, 1889.—*Continued.*

Dispositions by Mercantile Agents.

Having examined the preliminary part of the Statute, let us come to the first of its two principal divisions, namely, that which deals with dispositions by mercantile agents, and is contained in sections 2 to 7.

. *Powers of mercantile agent with respect to disposition of goods.*—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

It is necessary to keep in mind that the provisions of this part of the Act deal exclusively with *mercantile agents*. Without repeating what has been already said when commenting in my last Lecture on the definition of *mercantile agent* in section 1 (1), it

may be well to point out that it was held under the earlier Acts that "the term *agent* does not include a mere servant or care-"taker, or one who has possession of goods for carriage, safe "custody, or otherwise, as an independent contracting party; but "only persons whose employment corresponds to that of some "known kind of commercial agent, like that class (factors) from "which the Act has taken its name."* And it was laid down by Lord Blackburn in the House of Lords in 1880 "that an agent "who can pledge or sell must be an agent of that class, which, like "factors, . . . have a business which, when carried to its "legitimate result, would properly end in selling or in receiving "payment for goods."†

In accordance with this principle, a woman entrusted with the custody of furniture to keep in her own house on behalf of the owner was held not to be such agent, and therefore unable to give a valid assignment of the furniture as security for an advance to her;‡ and a wine merchant's clerk, who, as such, was possessed of dock warrants which his master authorized him to pledge for the purposes of his business, was held not to be such agent, and therefore he could not make a valid pledge for money lent to himself in fraud of his master.§ And in a case under the Act of 1889, a man employed at a small salary by a firm of jewellers to sell their goods at private houses on commission has been held not to be a mercantile agent, and therefore unable to give a valid pledge of the goods.‖

In the *City Bank v. Barrow*,¶ decided in 1880, Barrow, a leather merchant in London, sent some hides to Bonnell, a tanner in Canada, under an agreement whereby Bonnell was to tan the hides at a fixed rate and to consign them back to Barrow. Bonnell, however, having tanned and obtained bills of lading for the hides, pledged the bills of lading as security with the Toronto Bank, who sent them to their London agents, the City Bank. Barrow offered to pay the City Bank the amount due for tanning, freight, etc., on their handing him the bills of lading, but this offer was refused, and Barrow sued the Bank. In their defence the Bank set up that Bonnell carried on the business of a factor as well as that of a leather tanner, and that in the former character he had pledged the hides. The transactions with the bills of lading, having taken

* *Heyman* v. *Flewker* (1863), 13 Common Bench Rep. New Series, 527–528.

† *City Bank* v. *Barrow* (1880), 5 Ap. Ca. at 678.

‡ *Wood* v. *Rowcliffe* (1846), 6 Hare, 183, 191.

§ *Lamb* v. *Attenborough* (1862), 1 Best and Smith's Rep, 831.

‖ *Hastings* v. *Pearson* (1893), 1 Q.B. 62.

¶ 5 A. C. 664, H. L.

place in Canada, were governed by Canadian law, which, however, was the same with regard to factors as English law, and the House of Lords held that Bonnell, who was not employed by Barrow as a factor, was not an agent within the meaning of the Factors Acts, and that consequently the Bank could not set up any title to the bills of lading or to the goods, as derived from him, against the real owner.

Most of the decisions I have cited were decided, as I have said, under the earlier Factors Acts, the language of which differed in some respects from the present Act of 1889. Frequently one of the most difficult questions which lawyers have to consider is how far decisions have been affected by subsequent legislation. But with regard to those I have cited, they appear to be as sound law under the Act of 1889, as under the earlier Acts.

There is one important point in the case last cited—*City Bank v. Barrow*—to which I wish to direct special attention in connection with the sub-section which we are considering. That enactment, omitting certain words, provides that:

Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall be as valid, etc.

Now, although Barrow sent the hides to Bonnell in his character of a tanner, it seems that he sometimes acted for other persons in the character of a factor. Could it be contended under this enactment that, as he sometimes acted as a *mercantile agent*—namely, as a factor—and as he was with Barrow's consent in possession of the goods, although Barrow gave possession to him not as a factor, but as a tanner, a pledge by him comes within the protection of this section? Although such a pledge would come literally within the words of the section, it would not in my opinion be held to come within its meaning any more than within the meaning of the earlier enactments.

The following illustration of this point is given by Mr. Chalmers in his notes on the Factors Act:—Suppose a house were let furnished to a man who happened to be an auctioneer. Could he sell the furniture by auction and give a good title to the buyers? Surely not.*

Another illustration of this point, although not so simple a case as that suggested by Mr. Chalmers, is to be found in the case of *Cole v. North Western Bank*,† decided in 1875. One Slee carried

* Chalmers on the Sale of Goods Act, 1893, 4th ed., 130; 3rd ed. 127-28.
† L.R. 10 C.P. 354, where the Court of Exchequer Chamber affirmed the judgment of the Court of Common Pleas, reported L.R. 9 C. P. 470.

on the business of a warehouse-keeper in Liverpool, and also that of a sheep's wool broker. In his capacity of warehouse-keeper he was in the habit of receiving from the plaintiffs, who were merchants in London, bills of lading for sheep's wool and goat's wool to arrive in Liverpool, which when landed were deposited in his warehouses, under directions to send the plaintiffs a report and valuation, and then to await instructions as to disposal. Slee *usually* sold the plaintiffs' *sheep's wool*, under specific instructions given to him by them from time to time in each case, having no general authority from them to sell; and, when such last-mentioned sales were effected, Slee received the proceeds. The *goat's wool* he never sold, not being a goat's wool broker. In 1872 Slee had in his warehouse two parcels of sheep's wool and two parcels of goat's wool belonging to the plaintiffs, but had not received any instructions as to the sale of either. These he professed to pledge to the North Western Bank to secure an advance of £7,000, by a letter undertaking to hold them as trustee for the Bank. Slee absconded, and the Bank took possession of the goods; and the question arose whether Slee was under the circumstances an agent so "*intrusted* "*with the possession of the goods*"—the expression used in the Factors Act of 1842*—as to have been able to make a pledge to the Bank good as against the plaintiffs, who were the owners. With respect to the *goat's wool*, he clearly had no ostensible authority to dispose of it, not being a goat's wool broker, and the Courts held also that he had no such authority with respect to the *sheep's wool*, for he had been intrusted with the possession of it solely *as a warehouse-keeper*, and *not* in his capacity *as a mercantile agent* or broker; since he had no right to sell it without specific instructions, and he had received none. It was not enough that the party should be in possession of the goods: he must have been intrusted with them for the purpose of dealing with them according to the course of business of an agent.† Therefore the plaintiffs were entitled as against the Bank to all the wool.

Now, s. 2 (1) of the Act of 1889 does not contain the expression "intrusted with the possession of the goods," but in my opinion the effect of the enactment is in this respect the same as that of the Act of 1842, and the following observations of Blackburn, J., in *Cole v. North Western Bank*‡ appear still to hold good: "The "general rule of law is, that, where a person is deceived by another "into believing he may safely deal with property, he bears the "loss, unless he can show that he was misled by the act of the "true owner." The effect of the Factors Act, 1842, was that

* Section 1.

† *Per* Denman, J., in the Common Pleas (1874), L.R. 9 C.P. at 497.

‡ L.R. 10 C.P. at 372.

"where a third person has intrusted goods or the documents of "title to goods to an agent who in the course of such agency sells "or pledges the goods, he should be deemed by that act to have "misled any one who bonâ fide deals with the agent and makes a "purchase from or an advance to him without notice that he was "not authorized to sell or to procure the advance." But the statute did not "make the owner of goods lose his property if he trusted "the possession to a person who in some other capacity made sales, "in case that person sold them."

If this be still law, as I apprehend it is, we must put a limitation on the words of section 2 (1), and read into it some such words as those I have italicized and put in square brackets:—

Where a mercantile agent is, with the consent of the owner, in possession [*as a mercantile agent*] of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of [*such*] mercantile agent, shall be as valid, etc.

Now, supposing that Slee, instead of waiting until the goods were in his warehouse, had before the ship's arrival obtained the bills of lading and taken them to his bank, and got an advance by pledging the bills, would that have given the bank a good title? I answer: Certainly not. Under the Act possession of documents of title to goods is put on a par with possession of the goods themselves, but on no higher level.

Again, by this section possession of the goods or documents of title must be obtained *with the consent of the owner*. That consent may be obtained by the fraud of the mercantile agent, and still he may make a valid sale or pledge; but if his fraud amounts to obtaining possession either of the goods or of the documents of title by a trick—as where a clerk obtained goods by falsely pretending that he was a member of a well-known firm*—this will negative consent, and he cannot in that case make a valid sale or pledge.†

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* *Hardman* v. *Booth* (1863), 1 Hurlstone and Coltman's Rep. 803.

† *Kingsford* v. *Merry* (1856), 1 Hurlstone and Norman's Rep. 503; *Higgons* v. *Burton* (1857), 26 Law Journal, Exch. 342; *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. at 373; *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757, 795; *Cundy* v. *Lindsay* (1878) 3 A.C. 459, 467.

It is submitted that these cases bear out the statement in the text, and show that the statement of Collins, L. J., in *Cahn* v. *Pockett* (1899), 1 Q.B. at 659, that however fraudulent the person may have been in obtaining the possession, "provided it did not amount to *larceny by a trick*," he can give a good title, is too broadly expressed. In *Hardman* v. *Booth*, and several others of these cases, the goods were obtained by *false pretences*, but the obtaining of them did not technically amount to *larceny by a trick*, since the owner intended to part with his entire right of property in them, and not merely with the temporary possession. As to this offence, see *Larceny by a Trick* in Archbold's Criminal Pleading, 22nd ed. 418.

From this it clearly appears that a document of title to goods is wanting in one of the main requisites of a negotiable instrument in the strict sense; for, instead of the bonâ fide transferee for value getting a title free from all defects, the goodness of his title is seen to depend in some cases on the capacity or on the manner in which the transferor has obtained possession of the document. If, for instance, he has come into possession of it in any capacity other than that of a mercantile agent, or has obtained possession of it by a trick, his transferee does not get a good title; for the transaction is not protected by the Factors Act, and the true owner can claim the goods without re-imbursing the transferee his purchase-money or advance.

Let us now pass on to the second sub-section of section 2.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

This enactment protects a bonâ fide transaction with a mercantile agent whose authority has in fact been revoked; thus altering the rule laid down in *Fuentes v. Montis* (1868)* that a pledge of dock warrants by a mercantile agent whose authority was revoked was invalid, although the pledgees were ignorant of the revocation or indeed of the fact that he was an agent.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

A case had decided that a person entrusted with a bill of lading for the purpose of selling the goods, which enabled him to obtain a dock warrant, was not thereby entrusted with the dock warrant.† This enactment overrides that decision.‡

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

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* L.R. 3 C.P. 268; affirmed in Exchequer Chamber, L.R. 4 C.P.

† *Phillips* v. *Huth* (1840) 6 Meeson & Welsby's Rep. 572; *Hatfeild* v. *Phillips* (1845) 12 Clark & Finnelly's Rep. 343, H.L.

‡ See *Cole* v. *North Western Bank* (1875) L.R. 10 C.P. at 370.

The owner's consent will *primâ facie* be presumed from the fact of possession, but it will be open to him to rebut this presumption; as, by proving that the agent fraudulently obtained possession by a trick.

3. *Effect of pledges of documents of title.*—A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

It is necessary to bear in mind the wide meaning given by section 1 (5)* for the purposes of this Act to the expression "pledge"—which includes any contract pledging or giving a lien or security on goods. At the same time, this third section, though general in its terms, falls under the heading *Dispositions by Mercantile Agents*, and therefore is not of general application. Accordingly, a pledge of a warehouse-keeper's warrants by one who was neither a mercantile agent, nor a buyer under such circumstances as to bring the transaction within section 9, was held by the House of Lords not to be equivalent to a pledge of the goods; and the pledgee, who had taken the indorsed warrants as security for an advance, but had not intimated the fact to the warehouse-keepers, was held not to be entitled under the circumstances of the case to recover the goods or their value from other creditors of the pledgor, who had subsequently obtained possession of the goods: *Inglis v. Robertson* (1898).†

4. *Pledge for antecedent debt.*—Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

This section has the effect of drawing a broad distinction between a pledge made to secure a *present* or *future* advance and one made to secure a *past* debt or liability. A pledge for a present or future consideration falls under section 2; a pledge for a past consideration under section 4, which provides that the pledgee shall acquire no further right to the goods than the pledgor could at the time of the pledge have enforced. In other words, where the pledge is for a *past* consideration, to the extent of any right which the mercantile agent can *enforce* against the owner, the pledgee gets a valid security, but to that extent only.

Supposing a factor has drawn or accepted bills of exchange on behalf of his principal, he has a right to retain the goods, or, if sold, the proceeds, until those bills are discharged, but has he before those bills mature a right which he can *enforce* against his

* See Lecture II, *ante*, p. 47. † (1898) A.C. 616, H.L. (Scottish).

principal? His right is a right to be indemnified in the event of his having to meet the bills, but if he pledges the goods before the maturity of the bills, it would seem that he has no right which he can then enforce—*i.e.* he cannot then call upon his principal to pay any money.* If, therefore, in such a case the pledge is for a *past* consideration, it is conceived that it is not protected by this section, and is invalid. If, however, the pledgee in such a case sold the goods, he would be entitled to retain any sum which the factor had eventually paid to meet the bills.†

Again, a factor has no right which he can enforce against the principal, unless at the time the general balance of account is in his favour. Thus, where a factor at his principal's request kept separate accounts relating to goods coming by different ships as well as one general account, and on the general account the balance was against him, it was held that he could claim no lien in respect of any separate account.‡

Although section 4 mentions only a pledge of *goods*, by virtue of section 3 this includes a pledge of the documents of title to goods.

5. *Rights acquired by exchange of goods or documents.*—The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration ; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

This section deals with the various kinds of consideration for the validity of a sale, pledge or other disposition under the Act.

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* See *per* Best, C.J., in *Blandy* v. *Allan* (1823), 3 Carrington & Payne's Rep. 447, at 451 ; following *Fletcher* v. *Heath* (1827), 7 Barnewall & Cresswell', Rep. 517. Several writers appear to have considered that these decisions which were under the 5th section of the Factors Act, 1825, do not hold good under the later Acts : see Russell's Mercantile Agency, 2nd ed. 120–122 ; Boyd & Pearson's Factors Acts, 102 ; Pearson-Gee's New Factors Act (1889), 46 ; but this view is doubted in Blackwell's Law of Factors, 50–52, and is, it is submitted, not sound.

† *Taylor* v. *Trueman* (1830), *coram* Lord Tenterden, C.J., Moody & Malkin's Rep. 453.

‡ *Robertson* v. *Kensington* (1830), 8 Law Journal Rep. (Old Series), 183 ; 5 Manning & Ryland's Rep. 381.

A "pledge," for this purpose, includes any contract giving a lien or security on goods: see section 1 (5).*

This section, like section 2 of the Act of 1842, protects an exchange of goods or securities to the extent of the value of those given up by the pledgee—a transaction which a mercantile agent had no ostensible authority to effect prior to 1842.†

6. *Agreements through clerks, etc.*—For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. *Provisions as to consignors and consignees.*—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

The first sub-section only has operation in a case where there is a consignor, or person represented to be consignor, of goods who is *not* the owner, and a consignee who has not had notice that he is not the owner; and the first clause confers on the consignee, *after he has obtained possession* of the goods or bill of lading, a lien in respect of advances made by him to or for the consignor; for until he has obtained possession of the goods or bill of lading, no lien can attach. Whether the drawing or accepting of bills of exchange by the consignee may be deemed making "advances" within this section seems very doubtful.‡ Mr. Chalmers seems to indicate that they may be so deemed, by saying that the term must probably be interpreted by the light of section 5.§

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* Printed in Lecture II, *ante*, p. 47.

† *Taylor* v. *Kymer* (1832), 3 Barnewall & Adolphus' Rep. 320; *Bonsi* v. *Stewart* (1842), 4 Manning & Granger's Rep. 295; *cf. per* Blackburn, J., in *Cole* v. *North Western Bank* (1875), L.R. 10 C.P., at 370.

‡ The term "advances" is discussed in *Learoyd* v. *Robinson* (1844), 12 Meeson & Welsby's Rep. 745; *Macnee* v. *Gorst* (1867), L.R. 4 Eq. 315, 321, *et seq.*; and *Kaltenbach* v. *Lewis* (1883), 24 Ch. D. 54, C.A.; (1885) 10 A.C. 617, H.L.

§ Chalmers' Sale of Goods Act, 1893, 3rd ed. 132; 4th ed. 134. See s. 5, *supra*, which deals with the various kinds of consideration, but seems to throw little light on the meaning of "advances."

If a consignor for sale, who is under advances from the consignee, is allowed to remain in possession of the goods or of the bills of lading, he, being a mercantile agent, can make a valid sale or pledge of the goods or bill of lading, and the title of the purchaser or pledgee will not be affected by the consignee's claim; but, if the consignee has once obtained *possession* of the bills of lading or of the goods, his lien will prevail; for although the consignor be a mercantile agent, he cannot make a valid disposition within s. 2 of this Act after he has ceased to be in possession of the goods and documents of title.*

The second sub-section in effect declares that nothing herein shall derogate from the powers of a mercantile agent, which are declared by section 2.

Dispositions by Sellers and Buyers of Goods.

Having now come to the end of the first main division of the Act, we will consider the other main division, which deals with dispositions by sellers and buyers of goods. With regard to these clauses—8 to 10—generally, Lord Watson said: "The main if not "the sole object of these clauses appears to be this—to protect the "purchaser or pledgee of documents of title deriving right from "one who is lawfully in possession of them against a claim of re-"tention for unpaid price, or a right of stoppage *in transitu*, by "the original seller, in cases where the purchaser or pledgee has "had no notice of such claim or right."†

One effect of these clauses is, in all transactions coming within their terms, to give to a transfer of one of the other documents of title a similar effect to that given to the transfer of a bill of lading. We have seen that in transactions outside the scope of the Factors Act, the old difference between those documents still holds good. For example, the transfer of a dock warrant from a seller to a buyer will not *as between them* divest the seller's lien; the transfer of a bill of lading will. This is because a transaction directly between buyer and seller is not governed by the Factors Act, and the old distinction therefore holds good. But if the buyer sells or pledges the dock warrant to another, the transaction falls within these clauses, and the transfer to the third party is as effectual a bar to the original seller's rights as though it were the transfer of a bill of lading.

8. *Disposition by seller remaining in possession.*—Where a person, having sold goods, continues, or is in possession of the

* See Pearson-Gee's New Factors Act, 56.

† In *Inglis* v. *Robertson* (1898), A.C., at 628.

goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

This section (which took the place of section 3 of the Factors Act, 1877) is re-enacted in virtually the same terms by section 25 (1) of the Sale of Goods Act, 1893; the original intention having been to repeal the present section, which, however, has not been done.

It was formerly decided that if the buyer chose to leave the goods or documents of title in the hands of the seller, and the latter fraudulently pledged them for an advance to an innocent pledgee, the buyer could nevertheless recover the goods without repaying the advance.* This enactment overrides that decision.

In order to bring a case within this section, there must be a delivery or transfer *after* sale, without notice that such sale has taken place—*i.e.* a delivery of the goods by the seller in possession, or the transfer of documents of title. Therefore, where a merchant sold goods stored in a warehouse, a letter of hypothecation sent by him after the sale to the warehousemen for advances made by them in good faith without notice of the sale conferred no title on them.†

9. *Disposition by buyer obtaining possession.*—Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

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* *Johnson* v. *Crédit Lyonnais Co.* (1877), 3 C.P.D. 32.

† *Nicholson* v. *Harper* (1895), 2 Ch. 415.

This section (which replaced section 4 of the Factors Act, 1877) is, like section 8, reproduced by the Sale of Goods Act, 1893, section 25 (2).

Before this enactment it had repeatedly been decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by a buyer did not defeat the seller's rights, because the buyer held the documents as *buyer* and not as the seller's *agent*, and the transaction was therefore not protected by the earlier Factors Acts.* This enactment overrides those decisions, and treats the buyer as though he were a mercantile agent in possession of the goods or documents with the consent of the owner; so that such a transaction is now treated as though it came within the terms of section 2.

I may remind you that if the document dealt with by the buyer was a bill of lading, the protection of the Factors Acts was in most cases not needed, for at common law the transfer of a bill of lading to the buyer by giving him constructive possession of the goods put an end to the seller's lien, and the subsequent sale or pledge by the buyer to a third party defeated, either wholly or to the extent of the advance, the original seller's right of stoppage in transitu.† Yet if the buyer became possessed of the bill of lading conditionally, and so without any intention on the part of the seller to transfer at the time the property therein, he could not have made a valid disposition of it, unless the seller had so acted as to be estopped from disputing the buyer's right of disposal.‡

In order to bring a case within the protection of section 9, the seller must still have a lien or other right in respect of the goods. If, therefore, he has sold and delivered them to the buyer, and has lost all right in respect of them, except a right of action for the price or part of it, the section does not apply.

Thus, if a man buys goods which are lying in a warehouse, and the warehouse-keepers are instructed by the seller to deliver them to the buyer, and they thereupon transfer the goods into the name of the buyer in their books, and issue warrants to him, the possession of these warrants is obtained by the buyer in his own right, and is not deemed to have been obtained with the seller's consent within the meaning of this section.§

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* See *per* Blackburn, J., in *Cole* v. *North Western Bank* (1875), L.R. 10 C.P. at 373.

† *Lickbarrow* v. *Mason* (1793), 1 Smith's Leading Cases, 7th ed. 756; 10th ed. 674; Re *Westzinthus* (1833), 5 Barnewall & Adolphus' Rep. 817.

‡ See *per* Lord Campbell, C.J., in *Gurney* v. *Behrend* (1854), 3 Ellis and Blackburn's Rep., at 633-634.

§ *Inglis* v. *Robertson* (1898), A.C. 616, H.L. (Scottish). That the seller gave such instructions is stated in the Appellant's Case, and not denied in the Respondent's Case, but is not stated in the report.

10. *Effect of transfer of documents on vendor's lien or right of stoppage in transitu.*—Where a document of title to goods, has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

When the Sale of Goods Act, 1893, was introduced in Parliament as a Bill, it was intended to repeal this section as well as sections 8 and 9 of the Factors Act, but, as has been already said, this was not done, although these sections were re-enacted in the Sale of Goods Act—sections 8 and 9 in virtually the same words by section 25 (1) and (2) of the Sale of Goods Act, and section 10 in a more elaborate form by section 47 of the Sale of Goods Act, which I will now read. It begins with a general statement of law not contained in section 10 of the Factors Act.

47. *Effect of sub-sale or pledge by buyer.*—Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

The word *retention* is a Scottish technical term corresponding to our *lien.*

It then introduces a proviso which is an elaboration of section 10 of the Factors Act—in fact merely crossing the t's and dotting the i's. It is as follows:

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

This enactment makes the transfer of any of the other documents of title referred to in section 1 (4) have the same effect on the *seller's right of lien* or *stoppage in transitu* as was given to the transfer of a bill of lading by the Law Merchant.

Considerable light may, I hope, be thrown on these enactments

by presenting to you a concrete case which came before the Court of Appeal some two years ago—*Cahn v. Pockett.** In July, 1897, Steinmann & Co. of Liverpool contracted to sell to a Prussian merchant named Pintscher ten tons of copper to be delivered at Rotterdam c.i.f.—*i.e.* he paying a fixed price to cover cost, insurance and freight—payment to be made by his acceptance. On 27th August Cahn & Mayer purchased of Pintscher ten tons of copper. Three days later Steinmann & Co. in fulfilment of their contract with Pintscher, having shipped the copper on a ship belonging to the defendants forwarded to Pintscher a bill of lading indorsed in blank together with a draft for the price for acceptance. These documents reached him on the 1st September, and he, being then insolvent, did not accept the sellers' draft, and thereupon, instead of returning the bill of lading to the sellers (as it was his duty to do if he did not honour the draft), he handed the bill of lading to his bank with instructions to deliver it to Cahn & Mayer in fulfilment of his contract with them upon payment by them of the price, which was to be placed to the credit of his overdrawn account at the bank. On 2nd September the bank accordingly handed the bill of lading indorsed by Pintscher to Cahn & Mayer, who paid the price in cash to the bank, where the amount was credited to Pintscher's account. Cahn & Mayer took the bill of lading in good faith and without notice of the rights of Steinmann & Co., who, however, having learned that Pintscher was insolvent before the copper arrived at Rotterdam, gave notice to the defendants, the shipowners, to stop it *in transitu*, which the defendants did upon receiving Steinmann & Co.'s indemnity.

Cahn & Mayer then brought an action against the shipowners for non-delivery of the goods. The question was: Were the plaintiffs entitled to the copper as against the unpaid vendors? That depended upon the Sale of Goods Act coupled with the Factors Act, because apart from statute the plaintiffs clearly took no title, since, under the circumstances, the property had never passed out of the sellers; for the rule of the common law was the same as that now enacted by section 19 (3) of the Sale of Goods Act, 1893, which is as follows:—

Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

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* *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1899), 1 Q.B. 643.

It was argued for the defendants, who of course really represented the sellers, that as by virtue of this rule the property did not pass to Pintscher, he could transfer no title to the plaintiffs; and that the transaction between them was not protected by section 9 of the Factors Act, because Pintscher had not obtained possession of the bill of lading *with the consent* of the sellers, as their consent was conditional upon his acceptance of their draft; and upon these grounds Mathew, J., held that the plaintiffs were not entitled to recover as indorsees of the bill of lading.

This decision, however, was reversed in the Court of Appeal, where it was said that the crucial question was not whether the property had passed to Pintscher—which it clearly had not—but whether he obtained *possession* of the bill of lading *with the consent* of the sellers. *Possession* by section 1 (2) means actual custody, and by sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. consented to his having the actual custody. There was no unlawful taking by him—no fraudulent trick so as to negative the sellers' consent to his having possession. He might have fully intended to accept the draft, and no subsequent change in his intention with regard to that could destroy the consent of the sellers to his having once had possession of the bill of lading. Even when, by electing not to accept the draft, it became his duty to return the bill of lading, it was still in his possession for that purpose with the consent of the sellers, who might have avoided all difficulty by sending the bill of lading to their own agent instead of to the buyer direct. The sellers had consequently no right of stoppage *in transitu*, for the bill of lading had been "*lawfully transferred*" to Pintscher as buyer by the sellers, who had indorsed it in blank, within the meaning of section 47 of the Sale of Goods Act; and the plaintiffs were entitled to recover.

Supplemental.

We now come to the Supplemental Part of the Act—sections 11 to 17.

11. *Mode of transferring documents.*—For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Document of title is defined by section 1 (4).*

When a document is transferable by indorsement, there must also, it seems clear, be delivery in order to complete the transfer: *cf.* section 21 (1) of the Bills of Exchange Act, 1882.

* Printed in Lecture II, *ante*, p. 45.

12. *Saving for rights of true owner.*—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

This Act having validated, as between a mercantile agent and third parties acting in good faith, various acts done by such agent in excess of his *actual* authority but within the scope of his *ostensible* authority, this sub-section provides that nothing in this Act shall

(1.) Authorise an agent to exceed or depart from his [actual] authority *as between himself and his principal;* or,

(2.) Exempt him from any *civil* liability for so doing—*e.g.* he will still be liable in an action for damages brought by his principal; or,

(3.) Exempt him from any *criminal* liability for so doing.

The present Act does not of course deal with criminal law at all. Frauds by agents, bankers, or factors are dealt with by sections 75 to 87 of the Larceny Act, 1861; *see* Archbold's Criminal Pleading, 22nd ed. 542-553. Sections 75 and 76 of that Act have now been repealed by section 2 of the Larceny Act, 1901, and section 1 of this latter Act has been substituted for them.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

It has been already seen that goods in the hands of a factor are deemed to be held on trust, and do not pass to his trustee in bankruptcy.*

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject

* As to the effect of a factor's bankruptcy, see Answers to Questions, 10, 11 and 12, *ante*, pp. 55-62.

to any right of set off on the part of the buyer against the agent.

The rule as to such right of set-off is this:—Where an agent sells in his own name for an undisclosed principal, and the principal sues the buyer for the price, the buyer cannot set off a debt due from the agent unless in making the contract he was induced by the conduct of the principal to believe, and did in fact believe, that the agent was selling on his own account.*

13. *Saving for common law powers of agent.*—The provisions of this Act shall be construed in amplification and not in derogation of the powers exerciseable by an agent independently of this Act.

As already pointed out,† an agent may be given *express* authority enlarged to any extent, or an agent may have *ostensible* authority by reason of the conduct of his principal, quite outside this Act, which this section declares is not to derogate from such powers.

14. *Repeal.*—The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

The Schedule contains the four prior Factors Acts of 1823, 1825, 1842, and 1877.

15. *Commencement.*—This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16. *Extent of Act.*—This Act shall not extend to Scotland.

The Act was extended to Scotland by the Factors (Scotland) Act, 1890, which was passed and came into operation on the 14th August, 1890.

17. *Short title.*—This Act may be cited as the Factors Act, 1889.

This concludes our examination of the Factors Act, and I wish to thank you for the attention with which you have kindly listened to so exceedingly dry a subject. The right of stoppage in transitu, and the general subject of bankers' liens remain to be considered in my next Lecture.

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* *Cooke* v. *Eshelby* (1887), 12 A.C. at 271.

† See *ante*, p. 44, and as to ostensible authority, pp. 42, 55, 66-7.

LECTURE IV.

SUMMARY OF LECTURE III. ANSWER TO QUESTION:—PLEDGING DOCUMENTS IN EXCHANGE FOR OTHERS. STOPPAGE IN TRANSITU. LIEN:—PARTICULAR, GENERAL, IMPLIED, STATUTORY, CONVENTIONAL. STATUTES OF LIMITATION. MEMORANDUM OF DEPOSIT. BANKERS' LIEN. PROPOSITIONS DEDUCIBLE FROM CASES ON LIEN.

Summary of Lecture III.

A LARGE portion of my third Lecture was devoted, as you may remember, to answering various questions propounded to me arising out of my earlier Lectures; for as some of those questions related to matters of great practical importance, I thought it would be more satisfactory to you to give something approaching an adequate reply, although doing so involved dealing with those matters at considerable length.

I pointed out that although when we were considering the case of *Glyn & Co. v. East and West India Dock Co.*,* our attention was directed to the point that the Plaintiff Bank had not a good claim against the Dock Company, this would in no way affect the rights of the Bank against the *consignees* who had fraudulently caused the goods to be removed, and who would be liable in either civil or criminal proceedings. I stated that a banker to whom an indorsed bill of lading has been pledged by way of security cannot, if he realizes his security, repudiate the contract evidenced by the bill of lading, and that in my opinion there are no means

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* (1882) 7 A.C. 591, *ante*, pp. 17–19.

whereby the pledgee of a bill of lading can obtain the advantages without rendering himself subject to the liabilities of an indorsee. It was seen that the indorsement of a bill of lading by the seller *in blank* deprived him of his lien as effectually as if he had indorsed it *in full;* that where goods are still on board ship payment of the freight does not put an end to the bill of lading until the goods are delivered; and that a broad distinction exists between the rules applicable to bills of lading drawn in a set and those applicable to bills of exchange drawn in a set. The effect of the bankruptcy of factors and other parties interested in dock or warehouse-keepers' warrants and in delivery orders which have been pledged was considered at some length, and the difference between those two classes of documents was shown to be important, while the rights of parties were seen to be affected in some cases by a custom of the trade of the bankrupt. It was shown that no short answer can be given to the question what cases are governed by the Factors Act.

Returning to the Factors Act, 1889, we saw that sections 2 to 7 of the Act deal exclusively with mercantile agents, to the exclusion of such persons as servants, clerks, caretakers, etc.; that the cases decided before the Act of 1889 (including *Cole v. North Western Bank**) had established that a disposition by a man who happened to be a mercantile agent but who had been entrusted with the possession of goods in some other capacity was not valid; and that although the Factors Act, 1889, does not use the word "entrusted," yet that those decisions appear still to be law; and that, if that view be sound, section 2 (1.) must be construed as though it read "Where a mercantile agent is, with the consent of "the owner, in possession *as a mercantile agent* of goods, etc., "any sale, etc., made by him when acting in the ordinary course "of business of *such* mercantile agent shall be as valid, etc." I showed how the consent of the owner may be negatived when possession is obtained by a trick, and that the possession of the document of title gives no fuller powers than the possession of the goods themselves, the general result being that such a document of title is not a negotiable instrument in the strict sense.

Having considered the remaining sections of the first main part of the Act, we passed on to the second main part, dealing with dispositions by sellers and buyers of goods—sections 8 to 10. With regard to transactions *under these clauses*, we saw that the transfer of any other document of title has the same effect as the transfer of a bill of lading; but that direct dealings *between buyer and seller* are not within their purview, and that, in the case of

* (1875) 10 C.P. 354, *ante*, pp. 65–67.

such dealings, the old distinction between a bill of lading and other documents holds good. As an illustration of the protection afforded by those clauses, I set out the case of *Cahn v. Pockett** which was seen to establish the following propositions:—

1. Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and indorsed bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, and the buyer does not accept the bill of exchange, and wrongfully retains and transfers for value the bill of lading to a sub-buyer who receives it in good faith and without notice of any right of the seller, although the property in the goods does not pass to the first buyer (section 19 (3) of the Sale of Goods Act), yet the sale by him is protected by sections 9 and 10 of the Factors Act, and the corresponding sections 25 (2) and 47 of the Sale of Goods Act.

2. Under such circumstances the first buyer must be deemed to have obtained *possession* of the bill of lading "with the *consent* of "the *seller*" within section 9, and to have been in possession of it "with the consent of the *owner*" within section 2 (1) of the Factors Act.

3. The bill of lading, having been indorsed by the seller and forwarded by him to the buyer, must be deemed to have been "*lawfully transferred*" to him within section 10 of the Factors Act, and section 47 of the Sale of Goods Act.

Finally the supplemental part of the Act was considered, which deals with the mode of transferring documents, with the saving of certain rights and common law powers, and with other incidental matters.

Answer to Question.

Pledging Documents in Exchange for Others.

After the Lecture the following question was put to me with reference to s. 5 of the Factors Act, which provides that an exchange may constitute a valid consideration:—

If a factor pledges with a banker two documents of title to goods together valued at £96, one at £38 and the other at £58, and subsequently obtains these from the bank by pledging in exchange

* (1899) 1 Q.B. 643, *ante*, pp. 76–77.

two other documents of a different separate value but together making up £96, say, one valued at £40 and the other at £56, is that transaction protected by section 5? Does it make any difference as regards the banker if the second set of documents belong to a different owner—the factor's principal—from the first set?

My answer is: Provided that the factor has obtained possession of the documents *with the consent of the owner*, such a transaction is protected by section 5 of the Factors Act; and it makes no difference as regards the banker to whom the documents actually belong. If, however, the factor has obtained possession of them without such consent the transaction is, of course, not protected.*

Stoppage in Transitu.

It is now necessary to say a few words with respect to stoppage in transitu, because it is impossible to follow the meaning of many questions arising in mercantile cases without some knowledge of this right. But, as it rarely affects the rights of bankers—the dispute in such cases being usually,† though not invariably,‡ between rival claimants to the *balance*, after the bank's claim has been satisfied—I do not purpose dealing with it at length.

The unpaid seller's rights are now defined by section 39 of the Sale of Goods Act, which declares as follows:—

39.—*Unpaid seller's rights.*—(1.) Subject to the provisions of this Act, and of any statute in that behalf,§ notwithstanding that

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* See s. 5, *ante*, p. 70; and s. 2 (1), *ante*, p. 63.

† See *e.g.* Re *Westzinthus* (1833), 5 Barnewall and Adolphus' Rep. 817; and *Kemp* v. *Falk* (1882), 7 A.C. 573.

‡ For instance, if the buyer of goods, having obtained with the seller's consent possession of the documents of title, pledges these to a banker who knows not merely that the buyer has not paid for the goods, but also that he is then insolvent, the transaction is not protected. See *Cuming* v. *Brown* (1808), 9 East's Rep. at 514-516; and *per* Lord Ellenborough, C. J., in *Vertue* v. *Jewell* (1814), 4 Campbell's Rep. 31; and the latter case discussed in C.A. in *Leask* v. *Scott* (1877), 2 Q.B.D. at 380-381. In such a case the banker would not have received "the same in good faith and without notice "of any lien or other right of the original seller in respect of the goods"; see s. 25 (2) of the Sale of Goods Act, 1893; nor it seems, "in good faith" within the meaning of s. 47, cited *ante*, p. 75; *cf.* ss. 9 and 10 of the Factors Act, *ante*, pp. 73, 75; and as the banker knew that the pledge was made in fraud of the seller's right to stop in transitu, the seller's right would prevail over the pledge.

§ See the Bills of Lading Act, 1855, and the Factors Act, ss. 8-10, which are *in pari materiâ*.

The frequent use in the Sale of Goods Act of the expression "subject to the provisions of this Act," is apt to lead the reader into a labyrinth, extrication

the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a.*) A lien on the goods or right to retain them for the price while he is in possession of them ;

(*b.*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them ;

(*c.*) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

It is important to bear in mind the distinction between the seller's *lien*, which attaches when the buyer is in default, whether he be solvent or insolvent, and is *lost* by the seller's giving up possession; and his right of *stoppage in transitu*, which arises after he has given up possession, but only in the case of the buyer's *insolvency*.

The right of stoppage in transitu is derived from the law merchant, and it enables the seller on learning of the buyer's insolvency to stop the goods whilst they are passing through channels of communication for the purpose of reaching the hands of the buyer. The right is regarded with great favour by the Courts on account of its intrinsic justice.* The right is now

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from which calls for considerable ingenuity. The expression occurs in ss. 21, 39, 41, 44, 47, 48, amongst others.

"Mark how the labyrinthian turns they take,
The circles intricate, and mystic maze!"

The above cited s. 39 enacts that the unpaid seller has a lien on the goods for the price while he is in possession of them, and s. 41 enacts that he is entitled to retain possession until payment or tender of the price in *certain specified cases*; and each of these sections is "subject to the provisions of this Act." There can be little doubt the true interpretation would be held to be that that provision in s. 39 is subject to the provision in s. 41, but this result is arrived at after an expenditure of time and thought on the reader's part, which might well have been saved, only because other interpretations seem to lead to absurd results. In the words of Brett, M.R. (in reference to another statute): "I enter an earnest protest that this mode of drafting Acts of Parliament does not promote clearness." *Hough* v. *Windus* (1884), 50 Law Times Rep. at 315.

* See *Kemp* v. *Falk* (1882), 7 A.C. at 590; *Cassaboglou* v. *Gibb* (1883), 11 Q.B.D. at 504, C.A.

governed by the provisions of ss. 39 and 44 to 46 of the Sale of Goods Act, 1893.*

Section 44 of the Sale of Goods Act, provides as follows:—

44.—*Right of stoppage in transitu.*—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

"The essential feature of a stoppage in transitu is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them."†

In order to form a clear notion of the meaning of the term *transitus*, writes Mr. Chalmers,‡ two points should be noted:—

1. The goods may be in transitu although they have left the hands of the person to whom the seller intrusted them for transmission. It is immaterial how many agents' hands they may have passed through if they have not reached their destination.

2. The term does not necessarily imply that the goods are in motion, for, if the goods are deposited with one who holds them merely as an agent to forward and has the custody as such, they are as much in transitu as if they were actually moving.

Goods, therefore, may be in course of transit—

1. While being *transported*, so long as they are in possession of the carrier as carrier, and it is immaterial that the carrier is nominated or appointed by the buyer;

2. While *deposited*, so long as they are in the possession of the carrier as carrier, or in the possession of some other bailee in course of transmission to the buyer.§

When goods, which have been sold, are in the actual possession

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* A good idea of the effect of these provisions can be obtained from the notes on them in Chalmer's Sale of Goods Act, 1893; and the whole law on the subject is treated with admirable completeness and lucidity in Ker and Pearson-Gee's excellent treatise on that Act.

† Per Cairns, L.J., in *Schotsmans* v. *Lancashire and Yorks. Ry.* (1867), L.R., 2 Ch. Ap. at 338.

‡ Chalmers on the Sale of Goods Act, 4th ed., 84-85.

§ This passage is taken from Ker and Pearson-Gee on the Sale of Goods Act, p. 240, where the authorities are cited.

of a carrier or other bailee, Mr. Chalmers points out* that three states of fact may exist with regard to them:—

1. First, the carrier or other bailee may hold them as agent for the seller; in that case the seller preserves his *lien*, and the right of *stoppage in transitu* does not arise.

2. Secondly, the goods may be *in medio*. The carrier or other bailee may hold them in his character as such, and not exclusively as the agent of either the seller or buyer. In that case the right of stoppage in transitu exists.

3. Thirdly, the carrier or other bailee may hold the goods either originally or by subsequent attornment, solely as agent for the buyer. In that case either there has been no right of stoppage or it is determined.

When the right of stoppage in transitu exists and the seller exercises it, it is incumbent upon the carrier to give effect to it, unless he is aware of a legal defeazance of the claim. If after notice lawfully given the carrier delivers to the consignee, or refuses to deliver to the seller, he is guilty of a conversion of the goods. In case of real doubt he should resort to an interpleader. The seller has also a remedy by injunction, or, if the goods be in the hands of the master of a ship, by arrest of the ship.†

I will not trouble you with the elaborate provisions as to the duration of the transitus and how stoppage in transitu may be effected, which are to be found in sections 45 and 46 of the Sale of Goods Act, 1893.

Lien.

We now pass on to consider the subject of lien. Before coming to that particular kind of lien with which we are more specially concerned—bankers' lien—it will be well to see that we have a clear conception of the meaning of the term lien, and also of the different kinds of lien that may exist.

Lien is a right which a person has to retain that which is lawfully in his possession belonging to another until certain pecuniary demands are satisfied.‡

Liens are either I. *Particular*, or II. *General*.

I. *Particular Liens.*

Particular liens are where persons claim a right to retain

* Chalmers on the Sale of Goods Act, 4th ed., 85-86.

† Chalmers on the Sale of Goods Act, 4th ed., 90, where the authorities are cited.

‡ See *Hammonds* v. *Barclay* (1802), 2 East's Rep. at 235; and *ante*, p. 5.

goods in respect of labour or money expended upon those goods; and these liens are favoured in law.*

If a man takes his watch to a watchmaker to be repaired, the latter has a lien on the watch for his remuneration—*i.e.* the right of retaining the watch until his reasonable charges are paid. This is a *particular* lien, because it exists only as a security for the particular debt incurred in respect of the watch.

II. *General Liens.*

General liens, on the other hand, are claimed in respect of a *general balance of account;* and although these are sometimes based on agreement between the parties, they are usually founded on custom only, and on that account are to be taken strictly.†

A general lien is available as a security for all debts arising out of similar transactions between the parties. Thus, if a solicitor has possession of title deeds belonging to his client, he has a *general* lien on them; that is to say, he is entitled to retain them until he is paid not only his charges for the particular work and expenses done and incurred in connection with those title deeds and the property to which they relate, but also the whole amount owing to him from that client for professional services.‡

Liens, whether particular or general, either: A. arise by operation of law; or, B. are created by statute; or, C. are based on agreement between the parties.

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* See *per* Heath, J., in *Houghton* v. *Matthews* (1803), 3 Bosanquet and Puller's Rep., at 494.

This is the ordinary meaning of particular lien, but lien is a word of wide signification, and where goods or deeds or other documents are deposited with a person as a security for the repayment of a particular debt or as an indemnity for a particular liability, that person has a particular lien, but it is not a *mere* lien, as his rights are more extensive than such as accrue under a simple lien (which confers no power of sale: see *ante*, p. 5), since on the debtor's default a power of sale will be inferred: see *per* Gibbs, C.J., in *Pothonier* v. *Dawson* (1816), Holt's Rep. at 385; and *cf. Donald* v. *Suckling* (1866), L.R. 1 Q.B. at 604.

† See *per* Heath, J., in *Houghton* v. *Matthews*, *ubi supra*.

‡ *Cf.* Sweet's Law Dictionary, "Lien," at p. 490.

The meaning of the term *general lien* appears to be frequently misunderstood—a fact illustrated by some of the answers to the Examination Paper set on these Lectures. Instead of the correct answer that a lien is said to be general when it is in respect of a general balance of account, in some answers it was stated to be general when it extended to all the debtor's property which was in the hands of the creditor; and in others, when it was not confined to any particular property but to the general property of the debtor; and mortgage debentures of a Company charging its property for the time being were mentioned as an instance of general lien. Such a floating security, however (as to which see *ante*, p. 6), cannot properly be called a lien, nor would such a debenture afford the holder a security for anything beyond the particular amount for which it was issued.

A. *Implied Liens.*

Liens arising by operation of law, called *liens by implication*, or *implied liens*, are those which arise by the common usage of trade from the relation of the parties *without any agreement*, either express or inferred from their conduct or previous dealings. They spring from one of the two following sources:—

i. The rules of the *common law* (including the law merchant), in which case the liens are *possessory*, *i.e.* dependent upon and giving a right to retain possession. Such a lien is a personal right which cannot be parted with, and continues only so long as the possessor holds the goods.*

By the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it.† This is in most cases a *particular* lien.

The principal instances of *general* liens arising by operation of law occur in the case of solicitors, bankers, brokers, factors, wharfingers and innkeepers.

ii. The rules of equity give rise to what are called *equitable* liens, as in the case of the lien of the vendor of land for unpaid purchase money—a lien which, unlike the *possessory* lien of the common law, *charges* the property of the purchaser after the vendor has given up possession.‡

B. *Statutory Liens.*

Liens called *statutory* liens are created by statute as in the case, referred to in a former Lecture,§ of the shipowners' lien for freight under section 494 of the Merchant Shipping Act, 1894, where the goods have been landed and placed in the custody of a wharfinger or warehouseman under the provisions of that Act; or, the lien of the seller of goods for unpaid purchase money—which was originally a common law lien, and is now expressly provided for by section 39 of the Sale of Goods Act.‖

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* *Per* Parke, B., in *Legg* v. *Evans* (1840), 6 Meeson and Welsby's Rep. at 42.

† *Per* Parke, B., in *Jackson* v. *Cummins* (1839), 5 Meeson and Welsby's Rep. at 349.

‡ See notes to *Mackreth* v. *Symmons* (1808), White and Tudor's Leading Cases in Equity, 4th ed., Vol. 1, 289 *et seqq.*; 7th ed., Vol. 2, 920 *et seqq.*

§ *Ante*, p. 17.

‖ *Ante* pp. 83–84. The seller's right in such a case exceeds a mere lien: see Blackburn on Contract of Sale, 2nd ed. 445 *et seqq.*

C. *Conventional Liens.*

Liens based on agreement between the parties are called *conventional* liens. The agreement may be *express*, or may be *inferred* from the previous course of dealings between the parties.*

The view seems not unfrequently to be taken that a lien, or at any rate a general lien, can arise only by implication of law and not by agreement between the parties; but this view is unsound, and there is no reason why a lien should not be given by agreement.

In *Kirkman v. Shawcross*† a number of dyers and bleachers gave notice to their customers that they would receive goods to be dyed or bleached only on condition that they should have a lien on them not merely for the work done on the particular goods but also for the general balance of the customer's account, and the Court of King's Bench decided that this was an agreement good in law and binding on the customers who had had notice of it.

In a later case,‡ where a charterparty expressly reserved to the owner a lien on the lading of the ship for all arrears of freight, etc., Lord Chief Justice Tindal said: "An express contract is the "strongest and surest ground upon which the right of lien can in "any case be placed."

It is true that in those cases in which a lien would be implied by law, if the parties have made a special agreement, that agreement must be examined to see whether it is or is not consistent with the lien. Such an agreement will sometimes be found to be inconsistent with the lien;§ but the mere existence of a special agreement not inconsistent with the lien will not exclude it.‖ On the other hand, where an agreement has been made, either express or to be inferred from the course of dealings between the

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* See *Rushforth* v. *Hadfield* (1806), 7 East's Rep. 224; *Wright* v. *Snell* (1822), 5 Barnewall and Alderson's Rep. 350.

† (1794), 6 Term Rep. 14.

‡ *Small* v. *Moates* (1833), 9 Bingham's Rep. 574, 590.

§ A statement in the judgment of the Privy Council delivered by Lord Westbury in Re *Leith's Estate*. *Chambers* v. *Davidson* (1866), L.R. 1 P.C. at 305, that "lien is not the result of an express contract; it is given by implication of law;" must be read in connection with the facts of that case, which show that by "lien" was meant the general implied lien of a Consignee of a West India Estate. In that case there was an express agreement for certain special *security*, which was held to exclude such implied lien, and the statement cannot, therefore, be taken as a general proposition of law.

‖ See *Chase* v. *Westmore* (1816), 5 Maule and Selwyn's Rep. 180; *Fisher* v. *Smith* (1878), 4 A.C. 1, H.L.; and Smith's Mercantile Law, 10th ed., Vol. 2, 700.

parties, its performance cannot be intercepted by claiming an implied lien.*

Statutes of Limitation.

One other matter of importance should be noticed in connection with liens. The Statutes of Limitation, which bar the *remedy* by personal action brought after the prescribed limits of time (viz. *six* years in actions of debt and *twenty* years in actions of covenant, *i.e.* contract by *deed*) do not discharge the *debt*. Any pledge or lien upon property, therefore, which a creditor may hold as security for his debt remains unaffected; and if he obtain possession of goods or documents upon which he has a lien for a general balance of account, he may hold them for a prior debt of which the recovery by action is already barred.†

Memorandum of Deposit.

Before dealing in detail with the general lien of bankers, I may remind you that there is no reason to prevent a banker and customer creating a conventional lien, that is to say, agreeing that certain goods or documents shall be subject to a lien—either a particular lien to cover a certain transaction or amount of indebtedness, or (as is more often the case) a general lien to cover the customer's general balance of account; and the object of such an agreement usually is to give the banker a lien over things to which the ordinary implied lien does not attach, and also a power of sale should the customer make default.

It, therefore, does not give a mere lien, but amounts either to a pledge or to an equitable mortgage by deposit.‡ Such a conventional lien is sometimes spoken of as a banker's lien, but that term is more properly confined to the general lien of bankers which arises by implication of law and therefore independently of agreement.

Some banks use a printed form of memorandum of deposit, sometimes called a letter of lien, which they get their customer to sign on obtaining an advance, of which the two Forms printed on the following pages are examples.

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* See *per* Lord Selborne, in *Fisher* v. *Smith* (1878), 4 A.C. at 12.

† See *per* Lord Eldon, C. J., in *Spears* v. *Hartly* (1800), 3 Espinasse's Rep. 81; and Leake's Digest of the Law of Contracts, 982.

‡ See the two Forms, *infra*: and *cf.* the first foot-note on p. 87 *ante*.

LONDON, 1901.

To

THE W. BANK LIMITED.

In consideration of your advancing to the sum of on loan, until the day of next herewith deposit with you the warrants for the undermentioned goods as collateral security for the due payment of the same, with interest at the rate of per cent. per annum, above the minimum rate of the Bank of England from time to time prevailing, BUT NOT LESS THAN FOUR PER CENT. or such other rate of interest as may be hereafter agreed upon; and in default of paying the above-mentioned loan and interest when due, hereby authorise you to sell the said goods, or any other goods of which the warrants or delivery orders may be substituted, and either by public auction or private contract, and in such lot or lots as you may think fit, and out of the net proceeds to pay the said loan and interest, and any other moneys then due to you.

You are to be at liberty to sample all or any of the said goods, also to insure them against fire and debit with the premiums thereon.

$\frac{I}{We}$ declare that the present selling price of the said goods in the market is as stated below, making a value of in all £ . If at any time during the continuance of the loan such market price should decline $\frac{I}{We}$ will keep up the total value by depositing with you other approved securities, or pay off such part of the loan as you may require, failing which you are to be at liberty to realize as before-mentioned without waiting for the maturity of the loan.

The rent and other charges due on the said goods do not exceed £

This security is to extend to any sum or sums of money in which may be indebted or liable to you while any goods or warrants of remain in your possession, and either on joint or separate account.

STAMP
6d.

Ship Marks and Numbers.	Merchandise.	Net Weight.	Price.	Value.

Warrants are deliverable at Eleven o'clock and One o'clock against orders lodged at least one hour previously, except on Saturdays, when deliveries are half-an-hour earlier.

LONDON, 1901.

TO THE MANAGER,

X. BANK LIMITED,

SIR,

In CONSIDERATION of your advancing to $\frac{me}{us}$ the sum of at the rate of per cent. per annum, repayable with interest on the $\frac{I}{we}$ hand you herewith the undermentioned Securities, value £ to be held by you as Collateral Security for the due repayment of the said loan, and the interest thereon.

It is understood and agreed that the current market price of the Securities held by you shall, at all times during the continuance of the loan, represent a value exceeding by per cent. the amount of the loan then outstanding; and if at any time it be otherwise, $\frac{I}{we}$ engage, without notice from you, to provide you with such additional Security to your satisfaction, or to pay off so much of the loan as shall restore the said margin; and in the event of $\frac{my}{our}$ failing to do so, or of the loan remaining unpaid after it becomes due, $\frac{I}{we}$ hereby authorize you to realise the Securities as you may deem fit, for the purpose of repaying yourselves the amount due to you, and $\frac{I}{we}$ undertake to pay you any difference between the net proceeds of the Securities and the amount due to you, as well on account of the sum advanced as for interest thereon and all charges and expenses of realisation.

The above Securities are to extend to any sums of money in which $\frac{I}{we}$ may be indebted to you while the Securities or any of them remain in your hands.

6d.
Stamp.

LIST OF SECURITIES.

Bankers' Lien.

We will now direct our attention more especially to that kind of lien which is called bankers' lien.

Bankers, by the law merchant, have a *general lien* on all securities deposited with them *as bankers* by a customer, unless there be an express contract or circumstances from which a contract will be inferred inconsistent with lien.* This general lien of bankers is a usage of trade which is part of the law merchant, and therefore does not require proof in any Court of justice, for Courts are bound to take judicial notice of it.†

This is a lien, as we have seen, which is implied by the common law from the relation of banker and customer without any agreement between them either express or inferred from their conduct or previous dealings, and is a possessory lien.

It is a *general* lien because it can be claimed not merely in respect of a particular debt or transaction, but in respect of the customer's general balance of account.

In order to ascertain in any particular case whether the general lien attaches, it is necessary to inquire whether there was any agreement or contract between the parties at or before the time when the banker received the security; and, if so, what that agreement was; did it of itself confer a general lien; or, if not, was it consistent or not with the bankers' general lien arising under the law merchant? For a special agreement made by the parties themselves must be intended to regulate their rights, and therefore, although it does not necessarily, it often will exclude the application of a right conferred by law.

Thus, where a customer deposited a policy on his life for £5,000 with his bankers, Messrs. Jonathan Backhouse & Co., accompanied by a memorandum which expressed that it was to secure overdrafts not exceeding £4,000 with interest, and at his death his account was overdrawn to an amount exceeding £5,000, it was held that the charge was limited to the amount of £4,000 and interest, and that the bankers' general lien was displaced, it being inconsistent with the special contract, and therefore they were not entitled to hold the security for the surplus over the £4,000 and interest.‡

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* *Brandao* v. *Barnett* (1846), 12 Clark and Finnelly's Rep. 787, at 806, H.L.; approved by Privy Council in *London Chartered Bank of Australia* v. *White* (1879), 4 A.C. 413.

† See *per* Lord Campbell, in *Brandao* v. *Barnett* (1846), 12 Clark and Finnelly's Rep. at 805.

‡ In re *Bowes. Lord Strathmore* v. *Vane* (1886), 33 Ch. D. 586; see also *Vanderzee* v. *Willis* (1789), 3 Brown's Chancery Rep. 21; *London Chartered*

To what Class of Securities General Lien attaches.

In the case of *Wylde v. Radford*,* an important point was discussed, though it did not become necessary to give a direct decision on it, namely: to what *class of securities* does the general lien of bankers attach? Having referred to cases establishing the general lien of bankers by custom on securities deposited with them as bankers, Kindersley, V.C., said: "The cases refer to a "deposit of documents which are in their nature securities; but "there is some ambiguity in the term 'securities.' Anything "may, of course, be deposited, and deeds or plate after they have "been deposited may be said to be a security, but what is in-"tended is such securities as promissory notes, bills of exchange, "exchequer bills, coupons, bonds of foreign governments, etc.; "and the Courts have held, that if such securities are deposited "by a customer with his banker and there is nothing to show the "intention of such deposit one way or the other, the banker has, "by custom, a lien thereon for the balance due from the customer. "In any case if A. is indebted to B. and deposits in his hands a "security and nothing is said about it, the Court will assume "that the purpose of the deposit is to give a security, but even "with respect to the custom of bankers the same cases which "establish that rule also establish the rule that, notwithstanding "the general law as to the deposit of a security, if such deposit "takes place for a special purpose, then there is no general lien."

Negotiable Securities of a Third Party.

The general lien attaches to securities, if they are negotiable, which a banker acting in good faith has received from his customer, although it turns out that they do not belong to the customer but to a third party; for the holder of negotiable securities is assumed to be the owner.†

Bank of Australia v. *White* (1879), 4 A. C. 413, P. C.; *Wolstenholm* v. *Sheffield Union Bank* (1886), 54 Law Times Rep. 746, C. A.; and *cf. Jones* v. *Peppercorne* (1858), 28 Law Journal Rep. Chancery, 158, in which Wood, V.C., held that where bonds payable to bearer were deposited with a broker to "raise £25,000," and realized more, they were entitled to retain the proceeds to repay themselves not merely the advance of £25,000, but their general balance. The ground of the decision does not clearly appear, but the Vice-Chancellor on the facts of the case seems to have considered that the purpose of the deposit was not limited to raising the amount named.

* (1863), 33 Law Journal Rep., Chancery 51, at 53.

† *Per* Lord Campbell in *Brandao* v. *Barnett* (1846), 12 Clark and Finnelly's Rep. at 805-6.

Securities deposited for a Special Purpose.

The subject of bankers' lien was very fully considered in the important case of *Brandao v. Barnett* (1846).* In that case, Burn, a London merchant, who acted as agent for Brandao, the plaintiff, a Portuguese merchant, and for other foreign principals, had an account at the defendant's bank, where he kept several tin boxes, of which he retained the keys, and in which he locked up Exchequer bills, payable to bearer and transferable by delivery, which he had bought for his principals. From time to time it was his practice to take some of these bills out of one of the boxes and deliver them to the bankers, requesting them to receive the interest, and, whenever it became necessary, to exchange the bills for new ones. The new bills would be handed to him on his next visit to the bank, and he would then lock them up in the box, and the interest would be carried to his account. On 1st December, 1836, he took Exchequer bills for £10,000, belonging to Brandao out of a tin box and delivered them to the bankers to be exchanged. This they did, and Burn having become ill they retained the new bills, and during his prolonged absence from the bank acceptances of his were presented there and paid, and in January, when his account was overdrawn, he became bankrupt. The bankers claimed a lien on the bills still in their hands for the balance due.

The Court of Exchequer Chamber† decided that the fact that the bills were not the property of the bankers' customer Burn but of his principal Brandao was immaterial, and did not prevent the lien attaching, as the bills had been delivered to the defendants as bankers, and that it was their *duty* as bankers to receive the interest and exchange the bills; but the House of Lords, while agreeing that this would be law *if* the defendants had received the bills as bankers, reversed the decision on the ground that the bills had not been delivered to them in the course of their trade as bankers, nor was there any *duty* cast upon them as bankers to receive the

* 12 Clark and Finnelly's Rep. 787; 3 Common Bench Rep. 519, H. L.

† (1843) 6 Manning and Granger's Rep. 630.

The Court of Exchequer Chamber was a very strong Court of Appeal. It was originally constituted as a Court of Error in 1357 by 31 Edward III, c. 12; and before that Court, as remodelled in 1830, the judgments of each of the three superior Courts of Common Law—the Courts of King's Bench, Common Pleas, and Exchequer—were made subject to revision by the Judges of the other two, sitting collectively for that purpose. The composition of the Court thus admitted of three different combinations, consisting of those two Courts below which were not parties to the original judgment. It was abolished on the 1st November, 1875, by the Judicature Acts, which transferred its jurisdiction to the present Court of Appeal. See Judicature Act, 1873, s. 18 (4); Judicature Act, 1874, s. 2.

interest and exchange the bills. The old bills had been delivered to them for a special purpose inconsistent with lien. The fair inference from the transaction was that the new bills were intended to be handed to Burn that he might deposit them in the tin box, and the accidental circumstance that by reason of his illness these particular bills happened to remain in the hands of the bankers for a longer period than usual did not affect the case. The transaction was very similar to the deposit at a bank for safe custody of plate in a locked chest, upon which there clearly is no lien.

Charge on One of Several Properties comprised in Deed.

In the case of *Wylde v. Radford*,* which came before Kindersley, V.C., in 1863, a customer deposited with his bankers a deed of conveyance, including two distinct properties, giving them a memorandum charging *one* of the properties only as security for his general balance, and it was held that, as the charge created by the deposit was specifically limited to one of the properties only, the bankers could claim no lien on the other property.

Illustration of General Lien.

An interesting illustration of the effect of the bankers' general lien is afforded by the case of *Davis v. Bowsher*, decided in 1794,† in which a customer used from time to time to lodge bills with his bankers and obtain advances from them. The bankers charged no interest on the advances, but used to apply such advances to the discount of particular bills which they would select, and debit the customer's account with the amount of the discount. On one occasion the customer, after he had lodged a number of bills generally, applied for an advance, which the bankers allowed up to £1,400, and entered the discount on such of the bills as they selected, which were for a considerably larger amount than the advance. The customer, having been refused a further advance, demanded back the undiscounted bills, but the bankers refused to deliver them, claiming a lien over them to secure the balance in the event of some of the discounted bills not being met. The Court held that there were no special circumstances to deprive the bankers of their general lien, and they were therefore justified in retaining the undiscounted bills. By applying the advance to the discount of particular bills they had not selected these as the *sole basis of the credit*, nor relinquished their general lien upon the other securities. Bills paid into a Bank generally cannot be

* 33 Law Journal Rep. Chancery, 51.

† 5 Term Rep. 488.

taken away by the customer until he has paid his general balance. In this case, at the time the customer demanded them the balance was not settled, and he therefore could not insist on getting them back.

General Lien on Separate Banking Accounts.

Where a firm kept three accounts with their bankers, called the loan account, the discount account and the general account, the firm from time to time received advances, which were entered in the loan account and to meet which they deposited securities. In the course of the transactions they wrote a letter to the bankers, advising them that they proposed to draw upon the bankers for £10,500, but that as their credit would not afford a margin to that extent, they sent certain bills specified to hold as collateral security, and requesting the bankers to honour the drafts, they engaging to provide funds to meet them before maturity. The firm having become insolvent, the bankers claimed a lien on the bills for the deficiency on the *general* account, after satisfying the balance due on the *loan* account. It was admitted that the bills in question were not sent expressly as security for the particular advance of £10,500 and might properly be applied to discharge the balance of the loan account; and it appeared from the bank books that there was no particular reason beyond convenience for keeping the three accounts separate. The Court held that there was nothing in the course of dealing or in the terms of the letter to exclude the banker's *general* lien. As between banker and customer whatever number of accounts are kept, if it is in effect but one account, it is not open to the customer, in the absence of some special stipulation, to claim that securities which have been deposited are applicable to one account only.*

So, if a customer keeps accounts at several branches of a bank, and there is no special agreement that each account is to be kept separate, the bank is entitled at any time to combine the accounts even without giving notice to the customer;† unless the different accounts are kept for the customer in different characters—*e.g.*, one as a personal and the other as a trust account—in which case they cannot of course be treated as one account.‡

Again, if a firm has an account at a bank and one of the partners has a separate account at the same bank, the bank, in the absence of a special agreement, has no general lien for a balance due from the firm on securities deposited by the one partner for the purpose of securing an overdraft on his separate account. To allow such a

* Re *European Bank. Agra Bank Claim* (1872), L.R. 8 Ch., Ap. 41.

† *Garnett* v. *McKewan* (1872), L.R. 8 Ex. 10.

‡ *Prince* v. *Oriental Bank* (1878), 3 A.C. 325, 333, P.C.

claim would in effect be to permit the Bank to retain the property of one man to pay the debt of others.*

Propositions Deducible from Cases on Lien.

The following propositions may be drawn from the cases cited:—

1. Bankers have a general lien on all securities deposited with them *as bankers* by a customer in the absence of an agreement, express or inferred, inconsistent with lien.†

2. This general lien arises by implication of law, based on the law merchant, *i.e.*, without any agreement, express or inferred, between the banker and customer.‡

3. An agreement between the banker and customer inconsistent with the general lien of the law merchant will exclude such general lien.§

4. The deposit of a security to cover advances to a limited amount is such an agreement, and therefore the security is not subject to the general lien.‖

5. The better opinion seems to be that the general lien attaches only to securities strictly *negotiable*.¶

6. This lien attaches to negotiable securities, received in good faith, although they may not belong to the customer.**

7. Securities, whether negotiable or not, which it is the usual *practice* of bankers, although not a *duty* imposed on them, to keep for a customer, are not deemed to be deposited with them *as bankers*.††

8. Securities, whether negotiable or not, deposited for safe custody *only* are therefore not subject to the general lien.‡‡

9. Negotiable securities kept at a bank in the absolute control of the customer, except that from time to time they are handed

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* See *Wolstenholm* v. *Sheffield Union Bank* (1886), 54 Law Times Rep. 746, C.A.

† *Brandao* v. *Barnett* (1846), 12 Clark & Finnelly's Rep. 787, H. L.; *London Chartered Bank of Australia* v. *White* (1879), 4 A. C. 413, P. C.; *ante*, pp. 93, 95–96.

‡ *Ibid.* § *Ibid.*

‖ *Vanderzee* v. *Willis* (1789), 3 Brown's Chancery Rep. 21; In re *Bowes. Lord Strathmore* v. *Vane* (1886), 33 Ch. D. 586; *London Chartered Bank of Australia* v. *White* (1879), 4 A. C. 413, P. C.; *ante*, p. 93.

¶ See *per* Kindersley, V.C., in *Wylde* v. *Radford* (1863), 33 Law Journal Rep. Chancery, at 53; *ante*, p. 94.

** See *per* Lord Campbell in *Brandao* v. *Barnett* (1846), 12 Clark & Finnelly's Rep. at 805–6; *ante*, p. 95.

†† *Brandao* v. *Barnett* (1846), 12 Clark & Finnelly's Rep. 787; 3 Common Bench Rep. 519, H. L., *ante*, p. 95–96.

‡‡ *Ibid.*

to the banker for a special purpose, such as collecting the interest or exchanging them for similar securities to be handed to the customer, are not subject to the general lien.*

10. The deposit of a deed or document of title comprising two properties for the express purpose of charging *one* of the properties only gives no lien or charge over the other property.†

11. Where bills are lodged by a customer generally, and the banker appropriates a subsequent advance to the discount of some of these only, which he selects, he does not thereby relinquish his general lien on the *undiscounted* bills.‡

12. For the purposes of general lien, separate banking accounts kept under various titles—such as loan, discount and general account§—or kept at different branches of the same bank,‖ for a customer in the *same character*¶ may be treated as one account.

13. But separate banking accounts kept for a customer in *different characters*—such as a personal and a trust account—cannot be so treated.**

14. Nor can the separate banking account of one of several partners be treated as one with that of the firm for the purposes of general lien.††

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* *Brandao* v. *Barnett* (1846), *ubi supra*, *ante*, pp. 95-96.

† *Wylde* v. *Radford* (1863), 33 Law Journal Rep., Chancery, 51; *ante*, p. 96.

‡ *Davis* v. *Bowsher* (1794), 5 Term Rep. 488; *ante*, pp. 96–97.

§ Re *European Bank. Agra Bank Claim* (1872), L.R. 8 Ch. Ap. 41; *ante*, p. 97.

‖ *Garnett* v. *McKewan* (1872), L.R. 8 Ex. 10; *ante*, p. 97.

¶ *Prince* v. *Oriental Bank* (1878), 3 A.C. 325, 333, P.C.; *ante*, p. 97.

** *Ibid.* See Ex parte *Kingston*. Re *Gross* (1871), L.R. 6 Ch. Ap. 632; and *cf. Union Bank of Australia* v. *Murray-Aynsley* (1898), A.C. 693, P.C. (where the bank was allowed to set off moneys received without knowledge that they were trust-moneys).

†† See *Wolstenholm* v. *Sheffield Union Bank* (1886), 54 Law Times Rep. 746 C.A.; *ante*, pp. 97–98.

LECTURE V.

STOCK EXCHANGE SECURITIES:—SCRIP, SHARE CERTIFICATES, STOCK CERTIFICATES, DEBENTURES. POWERS OF A COMPANY: ACTS *ULTRA VIRES*. FOREIGN GOVERNMENT BONDS AND SCRIP. RIGHTS OF HOLDER IN DUE COURSE OF NEGOTIABLE INSTRUMENTS. TRANSFER OF SHARES AND STOCK. NOTICE OF ASSIGNMENTS AND CHARGES. BLANK TRANSFERS. NOTE ON USURY.

Stock Exchange Securities.

HAVING in the preceding Lectures dealt with the subject of advances made on the security of the mercantile instruments mentioned in the Factors Act—such as bills of lading, dock warrants, warehouse-keepers' certificates, and delivery orders—there remains for our consideration a very important class of documents, on the security of which principally bankers make those enormous loans—sometimes exceeding in a single case one million sterling—whereby stockbrokers and money dealers are enabled to carry out their transactions. This class of documents includes scrip, share and stock certificates, debentures and bonds—British, Colonial, and Foreign.

Now with respect to all these documents one of the most important things to determine in each case is whether the document is in the strict sense a negotiable instrument. If it is, did the banker or other person advancing the money take it in good faith? If both these questions are answered in the affirmative, he will have an absolutely good title as being the holder of a negotiable instrument which he took in good faith and for value.[1] If it is not negotiable, other matters have to be considered.

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[1] *Foster* v. *Pearson* (1835), 1 Crompton, Meeson & Roscoe's Rep. 849; *per* Blackburn, J., in *Crouch* v. *Crédit Foncier* (1873), L.R. 8 Q.B. at 381; *London Joint Stock Bank* v. *Simmons* (1892) A.C. 201, 219, 223. *Cf.* as to bills of exchange, the B. of E. Act, 1882, ss. 31, 38.

In any case, then, it is important first to inquire whether the particular instrument deposited as security has those two essential qualities, without which, as we have seen,[1] it cannot be strictly a negotiable instrument.

Those are:—

1. It must be transferable by mere delivery, or by indorsement and delivery (according to whether it is made payable to bearer, or to order) so that the property in it shall pass to the transferee free from any defect of title of the transferor or of any prior holder.

2. The holder must be able to sue on it in his own name.

Let us now see which of the documents we are considering possess these essential qualities.

Scrip.

A scrip certificate, called shortly *scrip*, is an acknowledgment by a company or its projectors or the issuers of a loan that the person named therein, or more commonly the holder for the time being, is entitled to a certain number of shares, debentures or bonds.[2]

Scrip certificate is said to be a contraction for *subscription certificate, i.e.* a certificate of the amount subscribed for by the applicant. Scrip for a share represents a right to acquire, but not necessarily an obligation to take, a share.[3] It must bear a penny stamp.[4]

Scrip is chiefly used in the case of shares, debentures and bonds which are payable by instalments, so that they cannot be issued until all the instalments are paid; therefore as soon as shares, debentures or bonds have been allotted to a subscriber or applicant, a scrip certificate, certifying that on due payment of the unpaid instalments the bearer will be entitled to receive shares, debentures or bonds to the amount of the certificate, is given to the allottee, in exchange for the letter of allotment; and when the instalments have been paid, the scrip is given up in exchange for the shares, debentures or bonds which it represents.[5]

In some companies, called *scrip companies*, scrip and shares are synonymous, and in them nothing is required to convert scripholders into shareholders. But in most companies a scripholder does not acquire the rights of a shareholder until his scrip certi-

[1] *Ante*, pp. 7, 48-49.

[2] See Sweet's Law Dictionary, "Scrip"; Lindley on Companies, 5th ed. 65.

[3] Lindley on Comps. 5th ed. 65; 6th ed. I, 84.

[4] The Stamp Act, 1891, ss. 1, 79 and Sched.

[5] Sweet's Law Dicty., "Scrip."

ficates have been exchanged for share certificates, and his name has been inserted on the company's register of shareholders.[1] And generally speaking, some formality has to be observed before a person can become a shareholder, the formalities requisite depending on the statute, charter or other instrument, by which the particular Company is governed.[2]

A scrip certificate is not necessarily a negotiable instrument, but if any particular scrip by a general custom of trade—*e.g.* the usage of the money market—passes as a negotiable instrument transferable by mere delivery, and there is nothing upon the face of it inconsistent with such negotiability, it is then a negotiable instrument.[3] It has hitherto been necessary in each case coming into Court to prove such general custom; but in the case of any scrip which has in previous cases been proved to be by custom transferable by mere delivery, it seems probable that in future the Courts will take judicial notice of the custom.[4]

The scrip of loans to foreign Governments has been proved to be by the general usage of the money market included among negotiable instruments transferable by mere delivery.[5]

The scrip of a Company may also be proved to be by general usage a negotiable instrument;[6] but, on the other hand, there may be some provision in the particular Company's private Act of Parliament, charter or other instrument by which it is governed, prohibiting the transfer of scrip until some condition has been complied with—*e.g.* until one-fifth of the amount of the share has been paid up[7]—and in such case until the condition is complied with, it is conceived that the scrip cannot be treated as negotiable.

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[1] Lindley on Comps. 5th ed. 66; 6th ed. I, 84–85.

[2] See *ibid.* 5th ed. 43-44; 6th ed. I, 61.

[3] *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 76; and in Ex. Ch. *ibid.* 337; (1876), 1 A.C. 476, H.L.; set out *post*, p. 112. *Rumball* v. *Metropolitan Bank* (1877), 2 Q.B.D. 194.

[4] After a usage has been proved sufficiently often, it becomes unnecessary in subsequent cases to repeat the proof, and the usage is then judicially recognized. With regard to several kinds of scrip—*e.g.*, that issued for a foreign Government loan—it would seem that this usage might now well be judicially recognized: *cf.* Lindley on Comps. 5th ed. 67, n. (*h*); 6th ed. I, 85, n. (*e*), 301; and the opinion of Bigham, J., in *Edelstein* v. *Schuler* (1902) 2 K.B. 144, cited *post*, p. 108, that the Courts ought now to take judicial notice that certain debenture bonds are by mercantile usage negotiable instruments transferable by mere delivery.

[5] *Goodwin* v. *Robarts*, *ubi supra.*

[6] *Rumball* v. *Metropolitan Bank* (1877), 2 Q.B.D. 194 (scrip for shares in a Joint Stock Bank).

[7] As in *East Gloucester Ry.* v. *Bartholomew* (1867), L.R. 3 Ex. 15; and *McEuen* v. *West London Wharves Co.* (1871), L.R. 6 Ch. Ap. 655 (Private Acts).

Share Certificates.

A share certificate is an instrument under the seal of the Company certifying that the person named therein is entitled to a certain number of shares.[1]

Such a certificate is *primâ facie* evidence of his title to the share or shares therein specified.[2] As against the Company, it amounts to a statement that the Company takes upon itself the responsibility of asserting that the person to whom the certificate is granted is the registered shareholder entitled to the specific shares included in the certificate, and further, in the case of a *bonâ fide* transferee who has no notice to the contrary, that the amount certified to be paid has been paid. The power of granting certificates is one for the benefit of the Company, as affording facilities for dealing in shares by showing at once a marketable title, and thus rendering the shares of greater value.[3]

As against a purchaser of shares, therefore, who buys on the faith of the certificate held by his vendor, and as against the vendor who, relying upon the certificate held by himself, enters into a contract for sale of the shares, the Company is estopped from denying the validity of the certificate, although originally obtained by fraud or under mistake.[4]

The certificate, however, purports only to show the legal and not the equitable title, and if persons are content to deal on the faith of the certificate with the registered shareholder without inquiring into the beneficial ownership and without obtaining a legal title by transfer and registration, they may find themselves ousted by an earlier equitable title.[5]

The mode of transferring shares is dealt with by the Companies Acts ;[6] and this will be more fully considered hereafter.[7]

A forged transfer is simply void, and in no way affects the title of the person whose name is forged. If the officer of a Company, acting upon the faith of a forged transfer or power of attorney, wrongfully (though innocently) transfers the shares of one of its shareholders, the Company can be compelled by the shareholder to make

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[1] Sweet's Law Dicty., "Share."

[2] Companies Act, 1862, s. 31.

[3] Buckley on the Comps. Acts, 7th ed. 103, where the authorities are cited.

[4] *Ibid.* 104. As to when a company is estopped by having issued a share certificate, see under Estoppel, *post*, pp. 158–164.

[5] *Shropshire Union Rys.* v. *The Queen* (1875), L. R. 7 H. L. 496, revg. Ex. Ch. L. R. 8 Q. B. 420; set out *post*, p. 122; and see the other cases there cited.

[6] Comps. Act, 1862, ss. 22, 24, 35, and Sched. I, Table A, Arts. 8–11 ; Comps. Act, 1867, ss. 26–33 ; Buckley, 487–496.

[7] *Post*, pp. 120–121.

good the loss, and replace the shares in his name, and pay him the dividends declared since the alleged transfer. And if a Company has been induced by fraud or forgery to issue a certificate on the faith of which a person has paid or advanced money, the Company on refusing to register him is liable to him in damages;[1] and the measure of damages is the value of the shares at the time of such refusal—not their value at the time he bought or advanced money.[2] The Company, however, will not be liable to him if he obtained the certificate by himself lodging with them a forged transfer.[3]

The Companies Act, 1862, contains nothing which expressly forbids shares to be made transferable by delivery, but such shares are clearly contrary to the spirit of the Act,[4] and this is rendered still more clear by the Companies Act, 1867,[5] which for the first time gives power to issue share warrants to bearer, transferable by delivery, and that only in the case of fully paid-up shares in limited companies. Except as issued under the provisions of that Act, there can be little doubt, although it has never been absolutely decided, that shares transferable by delivery are illegal.[6]

It would seem, therefore, that share certificates are not negotiable instruments, unless they are share warrants to bearer, issued under the Act of 1867.

Share Certificates of American Railroad Companies.

Share certificates, very similar to each other in form, are issued by various American Railroad Companies, and are well known on the London Stock Exchange. Each certificate states that the person named therein (sometimes the Company's London correspondent) is entitled to a certain number of shares—*e.g.* ten or twenty—in the Company's capital stock, transferable only in person or by attorney on the books of the Company; and on each certificate is indorsed a blank form of transfer and power of attorney to do all necessary acts to transfer the said shares on the Company's books.[7]

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[1] Re *Otto Kopje Mines* (1893) 1 Ch. 618, C.A.; *post*, p. 161.

[2] *Simm* v. *Anglo-Amer. Tel. Co.* (1879), 5 Q.B.D. 188, C.A.; *post*, p. 160.

[3] Lindley on Comps. 5th ed. 483, 484; 6th ed. I, 667–668.
By the Forged Transfer Acts, 1891 and 1892, Companies, Local Authorities, Friendly Societies, etc., are enabled to make compensation out of their funds for losses arising from forged transfers.

[4] See ss. 22, 23, 25, 26.

[5] S. 27 *et seqq.*

[6] See *General Co. for Promotion of Land Credit* (1870), L.R. 5 Ch. Ap. 363, 379; aff. *sub nom. Reuss (Princess of)* v. *Bos* (1871), L.R. 5 H.L. 176, 200, 201. The above paragraph is taken almost verbatim from Buckley on Comps. Acts, 491.

[7] See the forms printed in *London and County Bank* v. *London and River Plate Bank* (1887) 20 Q.B.D. at 234; and *Williams* v. *Colonial Bank* (1888), 38 Ch. D. at 389; and *cf. Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. at 37.

Upon transfer this form requires to be signed or in some cases signed, sealed and delivered,[1] in the presence of an attesting witness by the person named as shareholder, and after the name of the transferee is filled in, the documents are taken to the Company's office, the certificate is surrendered and cancelled, and a new certificate issued to the transferee whose name is entered on the register.[2]

The usual practice is for the transferor to sign the indorsed form in blank—*i.e.* without filling in the names of the transferee or attorney; and transfers so signed are passed from hand to hand by delivery only until they reach the hands of a holder who desires to be registered.[3]

It has been proved, to be the usage of the London Stock Exchange and bankers to deal with such certificates, having the indorsed transfers thus executed in blank, as transferable by mere delivery, like bonds payable to bearer; but such usage cannot make them negotiable instruments. The registered shareholder continues to be the legal owner until the power of attorney has been acted upon, and a transfer made and entered and registered in the Company's books; and until those things have been done the transferee of the certificate cannot sue upon it. The form of these certificates is therefore inconsistent with negotiability.[4]

Stock Certificates.

A stock certificate is an instrument under the seal of the Company certifying that the person named therein is entitled to a certain amount of stock.

Such a certificate is *primâ facie* evidence of his title to the stock therein specified.[5]

The paid-up shares of companies governed by the Companies Clauses Consolidation Act, 1845,[6] or by the Companies Act, 1862,[7] may be converted into stock; and stock so created under the latter Act may be re-converted into paid-up shares.[8] Under the

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[1] See *ibid.*; and as to this distinction, see *post*, pp. 130, *et seqq.*

[2] See *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. at 37.

[3] *Ibid.*

[4] See *per* Manisty, J., in *London and County Bank* v. *London and River Plate Bank* (1887), 20 Q.B.D. 232, at 238–241; (on this point there was no appeal: see S.C. in C.A. 21 Q.B.D. at 537;) *per* Chitty, J., in *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36, at 51; and *Williams* v. *Colonial Bank* (1888), 38 Ch. D. 388, at 398, 404, 408, C.A.; aff. in H.L. *sub nom. Colonial Bank* v. *Cady* (1890), 15 A.C. 267, at 272, 278, 285, 287.

[5] Comps. Act, 1862, s. 31.

[6] S. 61.

[7] Ss. 12, 28, and Sched. I, Table A, Arts. 23–25.

[8] Comps. Act, 1900, s. 29.

Act of 1862, after conversion of shares into stock the stockholders may transfer their interests in the same manner and subject to the same regulations as shares.[1] Stock is capable of being divided into and held in an irregular amount—*e.g.* £99 19s. 11d.[2]

Stock warrants to bearer transferable by delivery may be issued under the Companies Act, 1867,[3] in certain cases by limited companies, and such warrants are, therefore, negotiable instruments.

Debentures.

The word *debenture*, though of frequent occurrence in connection with companies, has no definite legal meaning.

For practical purposes, the following definition may be found useful:—

A debenture is an instrument issued by a company or public body as security for a loan of money. It contains either expressly or impliedly a promise to pay the amount mentioned in it, and almost invariably creates a charge on the undertaking or on the whole or part of the property of the company or public body. A debenture generally forms part of a series or issue of similar instruments, with a provision that they shall all rank *pari passu* in proportion to their amounts.[4]

A debenture may be either:—

1. A mere promise in writing to pay; or

2. A covenant or promise to pay under the seal of the company or public body—*i.e.* a bond; or

3. A mortgage or charge under the seal of the company or public body.

Any debenture which contains a charge is called a *mortgage debenture*.[5]

If it contains a charge on the undertaking or the general property of the company, the charge given is "a floating security," *i.e.* it charges the property of the company for the time being, but does

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[1] Comps. Act, 1862, Table A, Art. 24.

[2] This, however, is subject to the regulations of particular companies, which sometimes prevent the splitting of a shilling or even of a pound.

[3] See ss. 27–36.

[4] See Sweet's Law Dicty. "Debenture," where numerous varieties are referred to.

[5] Lindley on Comps., 6th ed. I, 337, n. (*q*). The Companies Clauses Act, 1845, which contained provisions as to the manner in which certain companies might borrow money on mortgage or bond, may be said to have created debenture mortgages and debenture bonds: ss. 38-55, and Forms in Scheds. C, D and E.

not prevent it from dealing with its property in the ordinary course of its business.[1]

Debenture stock was first created by the Companies Clauses Act, 1863.[2]

Debentures differ very materially in form, and are sometimes made payable to order, sometimes to bearer, but more commonly to the registered holder. Many of them are clearly not negotiable instruments. With regard to others, it is sometimes difficult to determine whether, even when purporting to be payable to bearer, they are or are not strictly negotiable.[3]

Debentures which merely make an unconditional promise in writing to pay at a fixed or determinable time a certain sum to a specified person, or to his order, or to bearer, are promissory notes, and therefore negotiable.[4] If they do not comply with these terms then, it is conceived, they will only be negotiable if there is a general usage of trade to treat them as such, and there is nothing upon the face of them inconsistent with negotiability.[5]

Debentures payable to the registered holder are usually made transferable by an instrument in writing, signed by the registered holder or his personal representatives, which the company is bound to register on payment of a small fee and such evidence of identity or title as it may reasonably require.[6]

Debentures which are not negotiable are, like other choses in action, *primâ facie* assignable only subject to all equities between the company and the original and all intermediate holders.[7] In order to avoid the difficulties arising from this rule, it is now usual for debentures to contain a provision that they shall be assignable free from, or that the principal money and interest will be paid without regard to, any such equities; if this be done,

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[1] Lindley on Comps., 5th ed. 196-197; 6th ed. I, 300, 317-318; *cf.* Buckley, 192. As to a floating security, see *ante*, p. 6.

[2] Ss. 22–35.

[3] See *e.g.* Re *Blakeley Ordnance Co.* Ex parte *New Zealand Bank* (1867), L.R. 3 Ch. Ap. 154, where the debenture contained a covenant to pay to B and D, "their executors, administrators or assigns or to the bearer hereof" £1,000, and a lengthy proviso; and it was held that, the debenture not being in form a promissory note, the Bank, a bonâ fide holder for value, however incapable of suing on it in its own name at law, could in equity in the winding up prove in its own name, and was free from any prior equities.

[4] *I.e.*, they fall within s. 83 of the B. of E. Act, 1882, although under the seal of a corporation: see s. 91 (2). Since the Act, a bill or note made payable to a particular person, and not indicating an intention that it should *not* be transferable, is transferable by indorsement and delivery: see ss. 8 (4), 31 (3), and 89 (1).

[5] On the principles laid down in *Goodwin v. Robarts* (1875), L. R. 10 Ex. 76, 337; (1876), 1 A. C. 476, H. L.; set out *post*, p. 112.

[6] As in Re *Goy. Farmer* v. *Goy* (1900), 2 Ch. 149.

[7] As to the assignment of choses in action, see *post*, pp. 117–119.

the company, or, if it is being wound up, the liquidator, will be precluded from setting up such equities against a transferee for value and in good faith.[1]

Debenture bonds of English or foreign companies expressed to be payable to the bearer or when registered to the registered holder, and indorsed with a condition that the moneys secured will be paid without regard to any equities between the company and the original or any intermediate holder, or containing terms to a like effect, whether they are payable in England or abroad, are by mercantile usage treated as negotiable instruments transferable by mere delivery;[2] and in a recent case it has been intimated that with respect to them it is no longer necessary to prove the usage, but the Courts ought to take judicial notice that such bonds are negotiable instruments.[3]

Debentures, or more often the trust deed for securing debentures or debenture stock, generally confer upon the debenture holders or their trustees very extensive powers for the management and realization of their security in case of default by the company. The powers so conferred depend in each case upon the terms in which they are expressed, and must be exercised according to those terms. They generally include an express power of sale, and the power to appoint a receiver and manager.[4]

In the case, however, of companies formed for a public purpose, such as railway,[5] tramway,[6] or waterworks[7] companies, there is no power of sale. The mortgage debenture of such a company, assigning to the holder the undertaking and all the tolls and sums of money arising out of the same, charges only the undertaking as a going concern, and its tolls and earnings. The debenture holder thus has a charge on the profits only, and cannot impound the capital, cash balances, or rolling stock. On default of the company, he is entitled to an order of the Court appointing a receiver of the nett earnings, but not to an order for the sale of the undertaking, or for the appointment of a manager.[8]

Formerly persons lending money to a Joint Stock Company were under a serious disadvantage, as the Legislature had not given them the means of ascertaining how much money the company had

[1] Re *Goy. Farmer* v. *Goy* (1900), 2 Ch. 149; Lindley on Comps. 6th ed. I, 301–302.

[2] *Bechuanaland Explor. Co.* v. *London Trading Bank* (1898) 2 Q.B. 658; *Edelstein* v. *Schuler* (1902) 2 K.B. 144.

[3] *Per* Bigham, J., in the case last cited; *cf.* n. [4], p. 102, *ante.*

[4] Lindley on Comps, 6th ed. I, 331.

[5] *Gardner* v. *London C. & D. Ry.* (1867), L.R. 2 Ch. Ap. 201.

[6] *Marshall* v. *South Staffords. Tram. Co.* (1895) 2 Ch. 36, C.A.

[7] *Blaker* v. *Herts W. W. Co.* (1889), 41 Ch. D. 399.

[8] See the cases in the last three notes.

raised.[1] But now by the Companies Act, 1900, it is the duty of every company registered under the Companies Acts, 1862 to 1900,[2] to register with the Registrar of Joint Stock Companies every mortgage or charge created on or after the 1st of January, 1901, being either:—

(*a*) for the purpose of securing any issue of debentures;[3] or

(*b*) on the company's uncalled capital; or

(*c*) created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or

(*d*) a floating charge on the company's undertaking or property.

The register, which is to contain certain particulars mentioned in the Act, is open to inspection by the public.[4]

Powers of a Company. Acts ultra vires.

In all transactions with a company, it is necessary to bear in mind the essential difference which exists between the contractual power of any ordinary person and that of a corporate body owing its existence to an Act of Parliament or charter which defines and strictly limits its powers.

A company is formed under the Companies Act of 1862 by registering a memorandum of association, which is, as it were, its charter, and defines the limitations of its powers. The articles of association play a subsidiary part, defining the duties, rights and powers of the directors as between themselves and the shareholders,

[1] See *per* Wood, V.C., in *Fountaine* v. *Carmarthen Ry. Co.* (1868), L.R. 5 Eq. at 324.

[2] S. 30.

[3] "Debenture" in the Act includes debenture stock: s. 30.

[4] See ss. 14 to 18. It is enacted that every such mortgage or charge shall, as regards any security on the property or undertaking, be void against the liquidator and any creditor, unless filed with the Registrar within 21 days after its creation, but without prejudice to any obligation for repayment of the money. It is the duty of the company (under heavy penalties), and any person interested is entitled, to register all such mortgages and charges. The register, which any person can inspect on payment of one shilling, is with respect to each company to show every such mortgage or charge, with the date, amount secured, short particulars of the property, and the names of the persons entitled, or, in the case of a series of debentures, the names of the debenture holders' trustees; and the Registrar is also to keep a chronological index of the mortgages and charges. It is also his duty to give a certificate of each registration, stating the amount secured, a copy of which is to be indorsed by the company on every debenture or certificate of debenture stock relating to the same. The company is also to keep at its office a copy of every instrument, or one of each series of debentures, requiring such registration, open to inspection by members and creditors for a small fee. The Registrar may, on proof of the debt being satisfied, make an entry of satisfaction on the register, and shall, if required, furnish the company with a copy.

and the mode of conducting its business and internal affairs, and anything done in violation or in excess of those articles, although *extra vires* of the directors, provided it is within the memorandum of association is *intra vires* of the company; but any act not warranted by the memorandum of association is *ultra vires* not only of the directors, but *of the company itself*, and is wholly void, so that the whole body of shareholders has no power to ratify it.[1]

In the case of a company formed under the Act of 1862, all the world has notice of the memorandum of association registered under the Act, and if the directors are empowered to do anything under limited powers—for instance to borrow money within a fixed limit—persons dealing with them ought to see that those powers are not exceeded.[2]

The principle that an act not warranted by the statute creating a company is *ultra vires* of the company, and therefore wholly void, and incapable of ratification, applies not merely to companies formed under the Act of 1862, but to all companies created by statute for a particular purpose.[3]

An illustration of this will be found in the case of *Lady Wenlock v. River Dee Company*,[4] where the defendant Company was empowered to borrow on mortgage £25,000 and no more. It did, however, borrow from Lord Wenlock various sums on mortgage amounting to £173,000, which it covenanted to repay. His executors sued the Company on the covenant for the full amount, but it was held that they could recover on the covenant only £25,000 with interest, while as to the balance they had merely a right in equity to recover such further sums as they could show had been in fact applied out of Lord Wenlock's advances in payment or discharge of any debts or liabilities properly incurred by the Company. They were not entitled to the benefit of any charge which the Company might have purported to create on its property for any sum beyond the £25,000 and interest.[5]

Foreign Government Bonds and Scrip.

The statement that an instrument cannot be negotiable unless the holder can sue on it in his own name[6] must be understood

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[1] *Ashbury Ry. Carriage Co.* v. *Riche* (1875), L.R. 7, H.L. 653, 668.

[2] See *per* Wood, V.C. (afterwards Lord Hatherley, L.C.) in *Fountaine* v. *Carmarthen Ry.* (1868), L.R. 5 Eq. 316, at 322.

[3] See the next case.

[4] (1883), 36 Ch. D. 675, n. C.A.; aff. (1885), 10 A.C. 354, H.L.; (1887), 19 Q.B.D. 155, C.A.

[5] (1888), 38 Ch. D. 534, C.A.

[6] *Ante*, p. 101.

subject to this qualification:—that bonds or scrip of a foreign Government may be negotiable in the strict sense by mercantile usage, although the holder cannot sue the foreign Government in our Courts, or even in the Courts of the foreign Government without its consent,[1] but has to rely entirely on its good faith.[2] But this apparent exception is due not to any defect of the title of the holder, but to the exemption of foreign Governments and their agents from liability to be sued, arising from the general principle of law that independent Sovereign States are not subject to the jurisdiction of the tribunals of another State. From this principle it follows that no British Court has jurisdiction to entertain an action against a foreign potentate for anything done or omitted to be done by him in his public capacity;[3] or against a foreign Government;[4] or against agents acting on behalf of a foreign Government;[5] or to enforce the contracts of a foreign Government against any property of such Government found within British dominions.[6]

The negotiability of foreign bonds and scrip may be illustrated by the following instances.

In *Gorgier v. Mieville*,[7] a bond, by which the King of Prussia declared himself and his successors bound to every person who should for the time being be the holder of the bond for the payment of the principal and interest at the times stated therein, had been deposited by the plaintiff with Agassiz & Co. to hold and receive the interest for him, and they pledged it to the defendants, who did not know that Agassiz & Co. were not the owners. In an action for conversion, it was proved that such bonds were sold in the market and passed from hand to hand daily, like Exchequer bills, at a price varying according to the state of the market. The Court held that they were negotiable instruments, and that the defendants got a good title. "It is," said Lord Chief Justice Abbott, "in its nature precisely analogous to a bank note payable to bearer, or to a bill of exchange endorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it, has power to give title to any person honestly acquiring it."

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[1] *Per* Jessel, M.R., in *Twycross* v. *Dreyfus* (1877), 5 Ch. D. at 616.

[2] See *ibid.*, and *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. at 84-85, and (in Ex. Ch.) 345.

[3] *De Haber* v. *Queen of Portugal* (1851), 17 Q.B. 171, 207.

[4] *Per* Jessel, M.R., in *Twycross* v. *Dreyfus* (1877), 5 Ch. D. at 616.

[5] *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. at 83-85; 344-345; (1876), 1 A.C. 476; *Twycross* v. *Dreyfus* (1877), 5 Ch. D. 605, C.A.

[6] *De Haber* v. *Queen of Portugal* (1851), *ubi supra*; *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198; *Twycross* v. *Dreyfus* (1877), *ubi supra*; *cf. Morgan* v. *Larivière* (1875), L.R. 7 H.L. 423.

[7] (1824), 3 Barnewall & Cresswell's Rep. 45.

In *Goodwin v. Robarts*,[1] the plaintiff had purchased on the London Stock Exchange some Russian and Austrian scrip through a broker, in whose hands he left it to be dealt with as he might direct, and the broker fraudulently pledged it with the defendants, his bankers, as security for an advance, and shortly afterwards became bankrupt and absconded. The defendants, who were ignorant of the plaintiff's claim, sold the scrip at the market price, and the plaintiff brought his action to recover the proceeds.

The scrip, which was in virtually the same form in each case, was issued by Messrs. Rothschild as the agents of the Russian and Austro-Hungarian Governments, they being employed by these Governments to negotiate and raise a loan for them respectively on Government bonds bearing interest. Each scrip note was for £100, and represented that when the instalments in which the £100 were to be advanced were all paid up, the bearer would be, after receipt thereof by Messrs. Rothschild, entitled to receive a definitive bond or bonds for £100 from the Imperial Governments. All the instalments on this scrip had been fully paid up, and the receipts for them signed by Messrs. Rothschild, before the plaintiff bought it.

It was proved that the scrip of a foreign Government, whether issued by that Government or their agents in England (including such scrip as was now in question) had been largely dealt in by bankers, money dealers, and English and foreign stockbrokers, and through them by the public for over fifty years; and that throughout that period it was the usage to buy, sell and pledge such scrip, which often passed through several hands before the bonds were issued, and to transfer it by mere delivery *as a negotiable instrument transferable by delivery;* and that this usage was always recognised by the foreign Governments issuing the bonds to the scripholders.

The contention on the part of the plaintiff was that scrip of this description, not coming under the category of any of the securities for money which by the law merchant are capable of being transferred by endorsement or delivery—indeed, not being a security for money at all, as there was no direct promise to pay money, but only a promise to give a security for money in the shape of a bond in the future—was not a security to which by the law merchant the character of negotiability could attach, and therefore the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against him. The chief effort of the plaintiff's counsel was to distinguish this case from *Gorgier v. Mieville*,[2] insisting that this scrip was not, like

[1] (1875), L.R. 10 Ex. 76; and in Ex. Ch. *ibid.* 337; (1876) 1 A.C. 476, H.L.

[2] *Ante*, p. 111.

the bond in that case, an engagement on the part of the foreign Governments, but could bind only Messrs. Rothschild who signed it; and that, assuming the foreign Governments were bound, it was not competent to anyone by the law of England to give to a security, not negotiable by the law merchant, the character of negotiability by making it payable to bearer, even though such security were a security for money; that still less could such character be given to this scrip, which was not even a security for money; and that the bonds of foreign Governments had been held to be negotiable only because they were in effect promissory notes.

This argument did not prevail with the Courts, who held that Messrs. Rothschild, as agents of the foreign Governments, were not personally liable, the holders who had taken the scrip having obviously relied solely on the good faith of the foreign Governments; and that such scrip was a negotiable instrument transferable by delivery. The bankers, having become bonâ fide holders for value without notice of the plaintiff's title, were not liable to him and judgment was accordingly given for the defendants,[1] and on appeal to the Exchequer Chamber[2] and to the House of Lords,[3] this judgment was affirmed.

The masterly judgment of the Court of Exchequer Chamber delivered by Lord Chief Justice Cockburn, is very instructive with respect to the history of negotiable instruments, and the development of the principle of negotiability by mercantile usage. With regard to the scrip, the Court were agreed that "its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here." With respect to the argument for the plaintiff, the Court, having given it full consideration, said:[4] "It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law forming part of the common law, and as it were coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which upon such

[1] L.R. 10 Ex. 76. [2] *Ibid.* 337. [3] 1 A.C. 476.
[4] L.R. 10 Ex. at 346, 352, 353.

"usages being proved before them have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law, that with reference to transactions in the different departments of trade, Courts of law in giving effect to the contracts and dealings of the parties will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to form part of it. 'When a general usage has been judicially ascertained and established,' says Lord Campbell, in *Brandao v. Barnett*,[1] 'it becomes a part of the law merchant, which Courts of justice are bound to know and recognize.' . . .

"Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? . . . The usage of the money market has solved the question, whether scrip should be considered security for and the representative of money, by treating it as such."

The ground that an instrument could not be given the character of negotiability by *recent* mercantile usage, because such usage formed no part of *the ancient law merchant*, was not deemed conclusive. "While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that; if a usage is once shown to be universal, it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to *Gorgier v. Mieville*,[2] are to be treated as negotiable.[3] . . .

[1] (1846) 12 Clark & Finnelly's Rep. at p. 805.

[2] (1824), 3 Barnewall & Cresswell's Rep. 45; *ante*, p. 111.

[3] L.R. 10 Ex. at 356. In *Edelstein* v. *Schuler* (1902), 2 K.B. at 154, Bigham, J., after observing that the length of time during which a usage has existed is an important circumstance in determining whether it is binding on the Courts, points out that "in these days usage is established much more

"We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision and having been sanctioned and adopted by the Courts, have become by such adoption part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself."[1]

In the present case the Court were "only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery."[2]

In the House of Lords Lord Selborne said:[3] "I know no rule or principle of English law which should prevent such instruments of title to shares in foreign loans from being transferable in this country, according to any custom or usage of trade which may be shown to prevail, if consistent with what appears upon the face of the instruments."[4]

The question, then, in such cases is whether the instrument is negotiable according to mercantile usage obtaining in England; and the question whether it is negotiable in a foreign country is immaterial. This point was brought out still more clearly in the following case.

In *Picker v. London and County Bank*,[5] the plaintiff was the owner of certain bonds issued by the Prussian Government, the coupons for interest not being attached to the bonds but contained in separate sheets. These bonds were stolen from the plaintiff, while the coupon sheets remained in his possession. The bonds,

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quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago." Therefore the comparatively recent origin of debenture bonds issued by companies "creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds."

[1] L.R. 10 Ex., at 357. [2] *Ibid*, at 358. [3] 1 A.C., at 495.

[4] It has already been seen (in the case of American railroad share certificates) that an instrument cannot become negotiable by mercantile usage if its very terms are inconsistent with negotiability: *ante*, p. 105.

[5] (1887), 18 Q.B.D. 515, C.A.

having come into the possession of a customer of the defendant Bank, were deposited by him to secure an overdraft with the Bank, who were not aware of anything wrong in relation to them. The plaintiff brought an action to recover possession of the bonds from the Bank, who set up that they were bonâ fide holders for value of negotiable instruments without notice of any defect of title, and adduced the evidence of Prussian lawyers to show that by the law of Prussia these bonds without the coupon sheets were payable to bearer and transferable by delivery. There being no evidence that the bonds without the coupons were treated as negotiable instruments by any usage of merchants in this country, judgment was given for the plaintiff, on the ground that an English Court and English merchants are not bound by a law or custom of trade in Prussia, and that it was necessary for the defendants in order to succeed to prove that these instruments were negotiable according to English law.[1]

Rights of Holder in Due Course of Negotiable Instruments.

An illustration of the protection afforded to the holder of negotiable instruments, who takes them in good faith and for value, and likewise of what may constitute "value," is supplied by the case of the *London and County Bank v. London and River Plate Bank.*[2] In this instance, the real plaintiff was a member of the Stock Exchange named Capps, who kept an account at the London and County Bank, and who had large business transactions with an outside broker, named Watters, for whom Capps used to buy and sell in the market, making him from time to time advances upon securities deposited. Warden, the secretary and manager of the Defendant Bank, acting in confederacy with Watters, stole from that Bank a number of securities including some bonds payable to bearer for £13,400; and Watters deposited these with Capps, who, unaware of the fraud, deposited them as a security for £13,000 with the Plaintiff Bank. Warden, requiring the securities for production at the audit of the Defendant Bank, got Watters to apply to Capps, who on receiving Watters' cheque for £13,000 gave his own cheque to the Plaintiff Bank, and got back similar (though not all of them the identical) securities, which were handed to Warden and placed in the Defendant's bank. The frauds of Warden and Watters having been detected, they were convicted;

[1] See *ibid.* at 518; app. in *Williams* v. *Colonial Bank* (1888), 38 Ch. D. at 404, C.A.; *cf. per* Tindal, C. J., in *Lang* v. *Smith* (1831), 7 Bingham's Rep. at 293.

[2] (1887), 20 Q.B.D. 232; 4 Times Law Rep. 179; affirmed in C.A. (1888), 21 Q.B.D. 535.

and Watters' cheque having been dishonoured, Capps in the present action sought to recover the securities from the Defendant Bank.

One important point to be decided was: Was the Plaintiff, Capps, entitled under the circumstances of the case to recover possession of the negotiable instruments from the Defendant Bank? This was decided in favour of the defendants, and the plaintiff appealed.[1]

Capps having originally obtained these for a valuable consideration, and having no knowledge of the fraud, the property in them had undoubtedly passed to him, and if he had continued to hold them the defendants could not have recovered them. And it was argued on his behalf that, although they had got into the defendants' possession, the restitution took place without the defendants' knowledge at a time when they did not give value for them. The Court of Appeal, however, after pointing out that when Warden stole these securities the defendants could not only have prosecuted him for the theft but also have brought a civil action against him to restore the bonds or pay their value; held[2] that when he restored the bonds, he was merely discharging his civil obligation to the defendants, and if the defendants had been aware of the loss and restoration, and chosen to accept the bonds in discharge of his civil obligation, they would clearly have been holders for value. As they were not aware of the theft, such acceptance by them would be presumed. The fact that some of the bonds were not the identical bonds stolen was immaterial; for it was the handing over by Warden to the defendants of negotiable instruments in performance of his civil obligation which placed the defendants in the position of holders for value; and, as at that time they had no notice of the title of any third party, the Defendant Bank became bonâ fide holders for value of these bonds and without notice of the plaintiff's title or of any fraud.

Transfer of Shares and Stock.

Considering the very large and valuable amount of personal property in modern times which consists of shares, stocks and debentures, it is necessary, in order to understand the legal history of their transfer, to bear in mind that in early times chattels personal consisted entirely of moveable goods, and there was no such thing as an *incorporeal* chattel personal. The right to sue for damages or for a debt was called in the Norman French of our early lawyers a *chose in action*, and though such a right was valuable, it was not

[1] Another point decided was that shares in an American Railroad Co. in the common form were not negotiable instruments; and on this point the plaintiff did not appeal: see 21 Q.B.D. at 537; *cf. ante*, p. 105.

[2] Affirming the judgment of Manisty, J.

regarded as *property*, and therefore had not the ordinary incident of property—the capability of being transferred.[1]

That a debt should be incapable of transfer was obviously highly inconvenient in commercial transactions; and in early times the custom of merchants rendered debts secured by bills of exchange or notes assignable by delivery, or indorsement and delivery, of the bills or notes.[2] But choses in action not so secured, could only be sued for by the original creditor, or the person who first had the right of action. In process of time, however, an indirect method of assignment was discovered, the assignee being allowed to sue in the name of the assignor; and in 1499, in the reign of Henry VII, it was decided that he might do this at his own cost.[3]

Choses in action, having once become assignable, became an important kind of property. By a statute of Henry VIII, 1545,[4] the taking of interest for money due or lent, hitherto forbidden, was made lawful, the rate being limited to 10 per cent.[5] Loans and mortgages soon became common, forming a kind of incorporeal personal property unknown to the ancient law.[6]

When this was once established, all personal property might be regarded as being either *in possession* or *in action*: in possession, where a man actually occupies and enjoys the thing; in action, where he does not actually occupy or enjoy, but has a right to it.[7] If this right could (before the Judicature Acts) be enforced by an action at law—*e.g.* the right to recover a debt or damages—it is called a *legal* chose in action; if the right could (before those Acts) only be enforced by a suit in equity—*e.g.* the right to recover a legacy from an executor, or a trust fund which had been misapplied by a trustee—it is called an *equitable* chose in action.

All personal things, then, which are not in possession are *choses in action*—a term including scrip, shares, stock and debentures; for of these things themselves there can be no occupation or enjoyment by the individual owner, who has no direct interest in the chattels *in possession* which may be vested in the corporation;

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[1] Williams' Personal Property, 11th ed., p. 4.

[2] As to promissory notes, see *per* Cockburn, C.J., in *Goodwin* v. *Robarts* (1875), L.R., 10 Ex. at 348-350, where the Statute 3 and 4 Anne, c. 9, (1704) is shown to be merely *declaratory* of the law merchant, by virtue of which promissory notes were assignable like bills of exchange.

[3] Williams' Pers. Prop., p. 5. It may be remarked that no Act of Parliament was passed between the years 1497 and 1503. It is not recorded, however, that this produced any social cataclysm.

[4] 37 Hen. VIII, c. 9.

[5] See Note on Usury, *post*, p. 141.

[6] Williams' Pers. Prop., 11th ed., p. 5.

[7] See Blackstone's Com., II, 389; and the passages referred to in the next note.

but of the fruits arising therefrom the owner may have occupation, enjoyment, and manual possession; and if the fruits are withheld, his only remedy is by action.[1]

Various statutes enabled the indorsee of a bill of lading, and the assignee of a life or sea policy of insurance, or of debentures of a limited class, to sue in his own name. But all choses in action not covered by such special enactments and not being negotiable by the law merchant were until November, 1875, assignable at law only by allowing the assignee to sue in the name of the assignor.

Since that date by virtue of the Judicature Act, 1873,[2] an absolute assignment in writing (not purporting to be by way of charge only), of which express written notice is given to the debtor or trustee, of any legal chose in action, effectually transfers the legal right thereto, subject to all prior equities. On notice of any conflicting claims, the debtor or trustee may call on the claimants to interplead, or may pay the money into Court.

A person can under this section assign not only an *existing* debt, but also an accruing debt arising out of contract,[3] so that if he has a banking account he can assign all moneys then or thereafter to be standing at his credit.[4] The notice may be given at any time, even after the death of the assignor; but the effect of delaying to give notice will be to let in any equities arising before notice.[5]

Now the general rule with respect to a chose in action is that an assignee takes it subject to all the equities which subsist against the assignor. Thus, if a man assigns a debt, the assignee will take it subject to the state of accounts between the assignor and his debtor, and if the debt has been satisfied wholly or in part, or if the debtor is entitled to a set-off against the assignor, the assignee, although he had no notice of the state of accounts, stands in no better position than the assignor;[6] in whose name, as we have seen, any action at law against the debtor formerly had to be brought.

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[1] See *per* Fry, L. J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. at 285–287; app. in H.L., S.C. (1886), 11 A.C. 426, 440, 446, 447.

[2] 36 & 37 Vict. c. 66, s. 25 (6). The operation of the Act was postponed by the J. A. Act, 1874 (save as to certain specified provisions) until the 1st November, 1875.

[3] *Brice* v. *Bannister* (1878), 3 Q.B.D. 569, C.A.; *Buck* v. *Robson* (1878) *ibid.* 686.

[4] *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511.

[5] *Ibid.* As to priority by notice, see *post*, p. 124.

[6] *Turton* v. *Benson* (1718), 1 Peere Williams' Rep. at 497; *Ord* v. *White* (1840), 3 Beavan's Rep. 357; *Watkins* v. *Clark* (1862) 12 Common Bench Rep. N.S. 277; and see the cases collected in the notes to *Ryall* v. *Rowles* (1750), White and Tudor's Leading Cases, Eq. 4th ed. II, 812; 7th ed. I, 132.

That general rule, however, does not apply to the shares or stock in a company governed by the Companies Act, 1862, or by any Act which gives a right to make a *legal transfer* of such shares or stock; for where a legal transfer of a chose in action can be effected, the necessity to sue in the name of the assignor does not arise; and a bonâ fide purchaser for value without notice of a prior equitable interest who gets a *complete legal* title will (unless the Act conferring the right of transfer otherwise provides[1]) take the thing free from equities.[2] In the case of shares or stock, such a purchaser having acquired the legal ownership in them obtains a title which cannot be impeached in equity any more than at law.[3] If, however, the legal title was acquired with notice of a prior equitable title, the latter will prevail.[4]

The question then arises: When does a transferee acquire a complete legal title to shares or stock? The answer to this must depend in each case on the provisions regulating transfer contained in the Act or charter governing the particular company, and in its articles of association.

With respect to companies under the Act of 1862, the shares or other interest of any member are capable of being transferred in manner provided by the regulations of the company;[5] the names of the members and the shares held by each must be entered on the register;[6] and if there is any improper entry or omission, the person aggrieved may apply to a Court for the rectification of the register.[7] Such companies may adopt or modify the provisions of Table A.,[8] by article 8 of which the instrument of transfer of any share must be executed both by transferor and transferee, and the transferor is to be deemed to remain the holder of such share until the name of the transferee is entered on the register in respect thereof.[9] The transfer of stock is as nearly as may be subject to the same regulations.[10]

The result is that in the case of all companies governed by these or similar regulations a complete legal title is not acquired by a transferee until the transfer has been *registered*; or, at any rate,

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[1] As in the case of the Jud. Act, 1873, s. 25 (6), cited *ante*, p. 119.

[2] See *per* Fry, J., in *Briggs* v. *Massey* (1880), 42 L.T. 49.

[3] *Ibid.*

[4] *Shropshire Union Rys.* v. *The Queen* (1875), L.R. 7 H.L. 496, set out *post*, p. 122; *cf. Ortigosa* v. *Brown* (1878), 47 L.J. Ch. at 172.

[5] S. 22. As to the transfer of a share of a deceased member, see s. 24.

[6] S. 25; *cf.* Act of 1867, s. 26.

[7] Act of 1862, s. 35. The Court may also award damages and costs.

[8] Ss. 14, 15.

[9] Sched. I, Table A, Art. 8.

[10] *Ibid.*, Art 24.

until all necessary conditions have been fulfilled "to give the transferee, as between himself and the company, a *present, absolute, unconditional right* to have the transfer registered," *before* the company is informed of the existence of a better title.[1] A transfer does not, therefore, in ordinary cases confer, while unregistered, a *legal title* to the shares.[2]

A transferee's right to be registered must always be subject to the conditions of the Act, charter, or regulations governing the company. Some articles of association, for instance, contain a provision that all transfers shall be subject to the approval of the directors;[3] but the powers of directors, such as that of approving transfers, are in the nature of trusts, and the directors cannot unreasonably or capriciously or unfairly refuse to exercise them.[4] If all necessary conditions have been fulfilled, so as to give the transferee a present, absolute, unconditional right to have his transfer registered, this right can be enforced against the company.[5] But the company is entitled to a reasonable time for making inquiries before registering;[6] and in practice it is usual to send notice to the transferor that a transfer has been lodged, and to allow time to receive his reply. If before the expiration of that time it receives notice of a prior equitable title, it is not bound to proceed further; and if the transfer remains unregistered the prior equitable title will prevail.[7] Indeed it would seem that registration by the company after receipt of such a notice would not affect the prior equitable title.[8]

If, then, a registered shareholder, although he is not the beneficial owner but a mere trustee, executes a *legal* transfer of shares to one who purchases them for value and in good faith, and the latter without notice of the trust becomes the registered owner, he obtains a complete legal title, and the prior equitable title of the beneficial owner will be defeated.[9] If he has no notice of the trust at the time he obtains a legal transfer of the shares but has notice

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[1] See *per* Lord Selborne, in *Société Générale de Paris* v. *Walker* (1885), 11 A. C. at 28-29.

[2] *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Moore* v. *North Western Bank* (1891) 2 Ch. 599; *Ireland* v. *Hart* (1902), 1 Ch. 522, 529.

[3] As in *France* v. *Clark* (1884), 26 Ch. D. 257.

[4] Re *Gresham Life Assur. Soc.* Ex parte *Penney* (1872), 8 Ch. Ap. 446; *Moffatt* v. *Farquhar* (1878), 7 Ch. D. 591.

[5] Lindley on Comps. 6th ed. I, 81, 652.

[6] Re *Ottos Kopje Mines* (1893), 1 Ch. 618, C. A.

[7] *Roots* v. *Williamson* (1888), 38 Ch. D. 485; *Moore* v. *North Western Bank* (1891) 2 Ch. 599; *Ireland* v. *Hart* (1902) 1 Ch. 522, 529.

[8] See *per* Lord Blackburn in *Soc. Gén.* v. *Walker* (1885), 11 A.C. at 41.

[9] *Briggs* v. *Massey* (1880), 42 L.T. 49; *cf. per* Stirling, J., in *Roots* v. *Williamson* (1888), 38. Ch. D. at 491.

before the transfer is registered, and obtains registration before the company gets notice of the trust, it has been held that he gets a complete legal title which will prevail over that of the beneficial owner.[1]

We have now seen that while shares and stock are choses in action, they differ from ordinary legal choses in action, such as debts, inasmuch as before the Judicature Act they were capable of legal transfer, and the legal title to them, unlike that to legal choses in action governed by that Act,[2] can be transferred free from prior equities.

They are also a class of property frequently held on trust, and therefore it often happens that the registered owner, who has the *legal* title, is a different person from the beneficial owner, who has the *equitable* title. This, as we have seen, sometimes enables a trustee to make a legal transfer in fraud of his cestui que trust, or a person having a limited interest only, such as a pledgee, who has become registered owner, to make a legal transfer without the authority of the pledgor.

It has also been noticed that share or stock certificates purport only to show the legal and not the equitable title, and that a person who advances money to the registered share or stockholder without inquiring as to the nature or extent of his interest, unless he obtains a complete legal title by transfer and registration, may find himself defeated by an earlier equitable title.[3]

A good illustration of this is afforded by the case of the *Shropshire Union Railways Co. v. The Queen.*[4] There, Holyoake, a director of the Railway Company, was trustee of certain stock therein for the Company itself, and as such trustee held the certificates for that stock and was on the register as owner. He fraudulently deposited the certificates with Robson for advances, and gave him a memorandum declaring the stock to be his own property and unincumbered, and undertaking on request to execute a legal mortgage thereof with a power of sale. Robson having died, Mrs. Robson, his executrix, applied to the Company for dividends as mortgagee, and was informed that the stock stood in Holyoake's

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[1] *Dodds* v. *Hills* (1865) 2 Hemming and Miller's Rep. 424, Wood, V.C. Whether this case is quite consistent with more recent decisions and would now be followed seems to be open to some doubt: see the observations upon it in *Ortigosa* v. *Brown* (1878), 47 L.J. Ch. at 172, and in *Roots* v. *Williamson* (1888), 38 Ch. D. at 498.

[2] See s. 25 (6), *ante*, p. 119.

[3] See *ante*, p. 103.

[4] (1875), L. R. 7 H. L. 496, revg. Ex. Ch. (1873), L.R. 8 Q.B. 420. See also *Roots* v. *Williamson* (1888) 38 Ch. D. 485; *Moore* v. *North Western Bank* (1891) 2 Ch. 599; *Powell* v. *London & Prov. Bank* (1893) 2 Ch. 555, C.A.; *Ireland* v. *Hart* (1902) 1 Ch. 522; and *cf. Carritt* v. *Real, etc., Advance Co.* (1889), 42 Ch. D. 263, 270.

name merely as a trustee. Mrs. Robson subsequently got Holyoake to execute a deed by which he purported to transfer the stock to her in compliance with his undertaking, and she applied to have the transfer and her name registered as owner, which the Company refused.

Mrs. Robson having moved for a mandamus to compel the registration of the transfer and of her name as owner, the mandamus was refused by the House of Lords on the ground that (it being admitted that the rights of the parties could not be affected by the transfer executed after Mrs. Robson had notice of the infirmity of her title) Robson's equitable title could not prevail against the earlier equitable title of the Company. A certificate of shares or stock is merely a solemn affirmation under the seal of the company that a certain amount of shares or stock stands in the name of the person therein mentioned. Anyone dealing with the registered owner ought to know that he might or might not be the *beneficial* owner, and that, if he was not, by taking from him an equitable assignment he would not get a title which would bind the beneficial owner. When in the first instance Holyoake represented that he was the beneficial owner of this stock, Robson had only to go with his authority to the Company and to require a transfer into his own name, and he would have ascertained the truth. It is the common practice for a trustee to hold the *indicia* of property, and the Company by issuing the certificates to Holyoake and registering him as owner had made no representation that he was beneficially entitled to the stock, and were in no way estopped from asserting their own beneficial title.[1]

Notice of Assignments and Charges.

Let us next consider the propriety of giving notice of assignments and charges.

Although notice is not necessary in order to make the title of the assignee of a chose in action or of an equitable interest in property complete,[2] yet it is in all cases advisable that he should give immediate notice to the debtor or trustee or other person liable, for until such notice be given, it is evident that the debtor or trustee may innocently pay the debt or transfer the stock to the transferor, or to another party to whom the transferor may have fraudulently transferred his right over again.

Oral notice of a formal and precise character is sufficient, but

[1] The Court of Ex. Ch., revg. the Q.B., had held that the Company were estopped. As to estoppel, see *post*, pp. 145–164. As to a company under the Comps. Act, 1862, not being bound in ordinary cases to take notice of equitable interests in shares or stock, see *post*, p. 125.

[2] See *per* Lord Macnaghten in *Ward* v. *Duncombe* (1893) A.C. 369, at 392.

general statements in casual conversation are not; and formal notice should be given in writing, in order to prevent any question as to priority.[1]

Priority by Notice.

In the case of an equitable assignment of a chose in action, notice was regarded in Courts of equity as so important as to lead to the establishment of the equitable rule that priority of notice gives priority of equity.

Apart from that rule, "an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title, though the title is no doubt subject to the infirmity which attaches to all equitable titles; and that infirmity is not and cannot be wholly cured or removed by notice to the trustees."[2]

But according to that rule, an assignee of a chose in action who takes his assignment without notice of an earlier assignment, and gives notice to the trustees in whom the fund is legally vested,[3] or to the assignor's debtor[4] (as the case may be), gains by giving such notice a better equitable right than an earlier assignee who has given no such notice.

The reasons given for the rule appear to be that, until the assignee gives notice, he has not done everything towards taking possession that the subject admits, or all that he can to make his title secure, and he enables the assignor, by thus allowing him to remain apparently the equitable owner, to commit a fraud and deceive innocent third persons.[5]

It has been doubted, however, by very high authority whether the rule rests upon any satisfactory principle, and whether it has not produced at least as much injustice as it has prevented. At any rate the principles upon which it is said to be founded are not so clear or so convincing that the rule ought to be extended to a new case.[6]

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[1] Robbins on Mortgages, II, 1257.

[2] *Per* Lord Macnaghten in *Ward v. Duncombe* (1893) A.C. at 392.

[3] *Foster v. Cockerell* (1835), 3 Clark and Finnelly's Rep. 456, H.L.

[4] *Marchant v. Morton* (1901) 2 K.B. 829.

[5] The cases which establish the rule are discussed and criticized at length by Lords Herschell, L.C., and Macnaghten in *Ward v. Duncombe* (1893) A.C. 369, at 376, *et seqq.*

[6] Lord Macnaghten, *ibid*, at 391, 393, 394. Stirling, J., in *Stephens v. Green* (1895) 2 Ch. at 152, said that *Ward v. Duncombe* "shows how difficult it is to determine the principles on which the rule is based;" and in Re *Wasdale* (1899) 1 Ch. at 167, referred to Lord Macnaghten's observations as to the rule not being extended as of the greatest weight. Cozens-Hardy, J., in *Lloyd's Bank v. Pearson* (1901), 1 Ch. at 872, accepted Lord Macnaghten's judgment as a guide, but did "not profess to be able to discover any definite principle upon which the rule is founded."

As the exact principle upon which the equitable doctrine of priority by notice rests is not easy to ascertain, it is sometimes very difficult to say whether in a particular case the doctrine applies.[1] The rule itself, however, is clearly established, and nothing short of an Act of Parliament can alter it; so that in cases to which it is applicable, it must prevail. "Priority in such a case depends simply and solely on priority of notice."[2]

Notice to Companies under the Act of 1862.

With regard to the assignment of the shares or stock of a company registered under the Act of 1862, section 30 of that Act has an important bearing on the question of notice. It enacts that: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar."

The effect of the section is:—

1. To relieve the company from taking notice of equitable interests in shares and stock.[3]

2. To preclude persons claiming under equitable titles from converting the company into a trustee for them.[4]

1. An illustration of the first proposition seems to be afforded by the case of *Simpson v. Molson's Bank*,[5] although that was not a decision on the language of the Companies Act. There, the Bank was incorporated under a Canadian statute which provided that: "The bank shall not be bound to see to the execution of any trust whether express, implied, or constructive, to which any of the shares of the bank may be subject." A testator's shares in the defendant Bank were transferred by entry to his "executors, viz. A. and B., for transmission," the executors having first left with the Bank a copy of the will. Under the will, A. was entitled to a share of the residue for life only, with remainder to his issue. The executors afterwards executed, and the Bank registered, a transfer of some of the bank shares to A., who disposed of them so as to defeat the rights of the remaindermen. The latter claimed damages from the Bank, on the ground that the will gave notice of their rights, and that it was the duty of the Bank not to disregard

[1] See *per* Channell, J., in *Marchant v. Morton* (1901) 2 K.B. at 831.

[2] *Per* Lord Macnaghten, (1893) A.C. at 391.

[3] See Buckley on the Comps. Acts, 7th ed. 96; *Soc. Générale de Paris v. Tram. Union Co.* (1884), 14 Q.B.D. 425, C.A., where the effect of s. 30 was much discussed: aff. *sub nom. Soc. Générale v. Walker* (1885), 11 A.C. 20, 30, H.L.; and *per* Fry, L.J., in *Bradford Bank v. Briggs* (1885), 31 Ch. D. at 28; and *per* Lord FitzGerald in S.C. (1886), 12 A.C. at 40; but *cf. per* Lord Halsbury, L.C., *ibid.* at 31-32. See also Lindley on Comps. 6th ed. I, 660.

[4] Buckley on the Comps. Acts, 96; and see n. [1] *post*, p. 126.

[5] (1895) A.C. 270, P.C.

them, but to refuse to register the transfer to A.; but the Privy Council held that by virtue of the enactment above cited the only question with which the Bank was concerned was that of *legal* title; that it was thereby relieved of the duty of making inquiry; that it had no notice that a breach of trust was intended or was being committed, and therefore that it did no wrongful act in registering the transfer.

2. From the second proposition—that the effect of s. 30 is to preclude persons claiming under equitable titles from converting the company into a trustee for them—it follows that as between successive equitable assignees of shares or stock, the better equitable right will be obtained by priority of *charge*, not by priority of *notice* to the company.[1]

Notice to Incumbrancers.

So far we have been considering the effect of giving notice to trustees, or to debtors, or to companies. Let us now turn our attention to the importance of giving notice to mortgagees or other incumbrancers. The effect of giving notice to them, it will be observed, is not to gain priority over advances already made by such prior incumbrancers, but to preserve priority over any advances which may be made by them in the future.[2]

It was decided by the House of Lords in 1861 in the case of *Hopkinson v. Rolt*,[3] that a first mortgagee whose mortgage is taken to secure what is then due and also further advances, cannot claim the benefit of his security for further advances in priority to a second mortgagee of whose mortgage he had notice before the further advances were made, even where the second mortgagee had notice of the first mortgage.

"The first mortgagee is secure as to past advances, and he is not under any obligation to make any further advances. He has only to hold his hand when asked for a further loan."[4]

The principle of the case is this:—"The owner of property does not, by making a pledge or mortgage of it, cease to be owner of it any further than is necessary to give effect to the security which he has thus created."[5]

The same principle was applied by the House of Lords in the

[1] *Soc. Générale de Paris* v. *Tram. Unions Co.* (1884), 14 Q.B.D. 425, C.A.; aff. *sub nom. Soc. Générale* v. *Walker* (1885), 11 A.C. 20, H.L.; Lindley on Comps. 6th ed. I, 633–634.

[2] This distinction is well illustrated by the case of *Bradford Bank* v. *Briggs* (1886), 12 A.C. 29, *post*, p. 129.

[3] 9 H. L. Cas. 514.

[4] *Per* Lord Campbell, L.C., *ibid.* at 534–535.

[5] *Per* Lord Blackburn in *Bradford Bank* v. *Briggs* (1886), 12 A.C. at 36.

London and County Bank v. Ratcliffe (1881),[1] where a dispute arose between a mortgagee and a purchaser of land sold subject to the mortgage. In that case Batten, a builder, a customer of the London and County Bank, made an equitable mortgage by depositing with the Bank some title deeds of land, accompanied by a written memorandum that they should be security for the existing and also the future general balance of his account. Batten afterwards contracted, with the knowledge of the Bank, to sell a valuable portion of the land to Ratcliffe, who had notice of the terms of the equitable mortgage. The purchase money was to be paid by instalments, and Batten stipulated in the usual way to make a good title. On the 2nd May, 1873, when the Bank received notice that the contracts of sale had been signed, Batten's overdraft amounted to £1,800, and shortly afterwards Ratcliffe paid an instalment of £1,500, £1,100 being paid direct to the Bank, and £400 with their concurrence to Batten. Batten's overdraft was thus reduced to £700. After that date Batten conveyed to Ratcliffe the land purchased, after receiving from him the balance of the purchase money, which exceeded £700, and which Batten paid as well as other sums into the Bank. The Bank continued the account, and without giving any notice to Ratcliffe, made fresh advances to Batten, so that on the general balance there was always a debt due to the Bank. Batten, having become bankrupt, the Bank as equitable mortgagees sued Ratcliffe, claiming a charge upon his property, and that he might be declared trustee of it to the extent of such charge; or else a charge upon the purchase money, which they alleged he had no right to pay to Batten without inquiring as to the state of his account.

The Court of Appeal and the House of Lords disallowed this claim, and held that the case was subject to the general rule respecting appropriation of payments in the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence—a rule commonly known as the rule in *Clayton's Case*[2]—viz., that neither party having made an appropriation, the law presumes that it is the first sum paid in that is first paid out, and it is the first items on the debit side of the account that are discharged or reduced by the first items on the credit side. Consequently the various payments made by Batten to his credit after 2nd May, 1873, had entirely extinguished his debt of that date to the Bank—viz., the £1,800—the subsequent debt having been created by advances after that date. The Bank was under no obligation to make those subsequent advances, and it was held that when the mortgagor

[1] 6 A.C. 722; 51 Law Journal Rep. Chancery, 28.

[2] (1816) 1 Merivale's Rep. 572; Tudor's Leading Cases on Mercantile Law 2nd ed. 1.

(Batten) exercised, with notice to the mortgagee (the Bank), the right which he undoubtedly possessed of selling the mortgaged estate, subject to the then existing charge of the Bank, and of making his own bargain with the purchaser on his own terms and in his own way without any concurrence of the Bank, the Bank could not make further advances so as to prevent or intercept (without any new agreement with Batten, or any notice to Ratcliffe beyond that which he had of the original security) the fulfilment in the ordinary course of the terms of the contract between Batten as vendor and Ratcliffe as purchaser. A purchaser of land, with notice that the title deeds have been deposited with a bank as security for the general balance on the vendor's present and future account, is not bound to inquire whether the bank has after notice of the purchase made fresh advances. The burden lies on the Bank if it makes advances on the security of the unpaid vendor's lien to give the purchaser notice that it has so done or intends so to do. The purchaser could then protect himself by seeing that the balance of the purchase money came into the hands of the Bank. On these grounds it was held that the Bank had no charge either on the land sold or on the purchase money as against Ratcliffe for the advances made after the 2nd May.

In a later case,[1] the same principle was held to apply where the first mortgagee had bound himself by covenant to make the subsequent advances; for if the mortgagor, being under no obligation to take further advances from him and from no one else, chooses to borrow from another to whom he gives a second mortgage, the first mortgagee is thereby released from his obligation to make further advances on the security of the property, since the mortgagor has by his own act deprived himself of the power to give the stipulated security; and if the first mortgagee, notwithstanding his release, and with notice of the second mortgage, makes further advances, he is in no better position than a stranger making advances.

Sir N. Lindley, M.R., observed[2] that the rule rests on no technicality, but is based on the plainest good sense. "When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first. Nor can any one who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has. On the other hand, the first mortgagee has no right to restrain the mortgagor from borrowing money from some one else, and from giving him a second mortgage, subject to the first."

[1] *West v. Williams* (1899) 1 Ch. 132, C. A. [2] *Ibid.* at 143.

"The principle on which these decisions are founded," said Lord Justice Chitty,[1] "appears to be, that a mortgagee cannot obtain a charge on property which is no longer the mortgagor's to charge, and which the mortgagee knows at the time when he makes his further advance is no longer the property of the mortgagor. No charge arises for a further advance until it is actually made. This principle is plain and simple, and is based on natural justice and fair dealing."

A company receiving notice of a transfer is in ordinary cases in the position of a neutral party, but in other cases it may be an interested party, as where it has a lien on the shares in respect of debts due from the holder. The difference between giving notice of an assignment or charge to a company merely *qua* company and giving such notice to a company as being itself mortgagee or incumbrancer of shares in the company has important consequences.

An excellent illustration of this is afforded by the case of the *Bradford Bank v. Briggs*.[2] There, the articles of association of the defendant Company, which was registered under the Companies Act, 1862, provided that the Company should have a first charge upon its shares for all debts due from the holder, and a shareholder had deposited his share certificates (which stated that the shares were subject to the articles) with a Bank as security for the balance due and to become due on his current account, and the Bank gave the Company notice of the deposit. The Company, which traded in coal, had after receiving the notice supplied the shareholder with large quantities of coal. The Bank sued the Company for an account of what was due to the Bank on its securities, and to have the same realized by foreclosure and sale, and for a declaration that the Bank's securities had priority over the Company's lien.

The Company contended:—

1. That by virtue of its articles of association a contract had been made with the shareholder, whereby a priority was conferred on the Company as against all persons claiming equitable interests in the shares and having notice of the articles.

2. That the deposit created a *trust* in favour of the Bank, and that by s. 30 of the Act of 1862 the Company was relieved from taking notice of such trust.

The Court of Appeal reversing the judgment of Field, J., upheld the defendant Company's contentions, holding that the principle laid down in *Hopkinson v. Rolt*[3] did not apply. The House of Lords, however, reversed this decision on both grounds, and held:—

[1] *Ibid* at 146.

[2] (1885), 29 Ch. D. 149; rev. by C. A. 31 Ch. D. 19; but rest. in H.L. (1886), 12 A.C. 29.

[3] (1861) 9 H.L. Cas. 514; *ante*, p. 126.

1. That that principle applied, and therefore that the Company could not in respect of debts which it had allowed the shareholder to contract after notice of the deposit claim priority over the Bank's advances.

2. That the deposit did not create a *trust* within the meaning of s. 30, and that section did not entitle the Company to ignore the notice.

The notice in such a case cannot, it is clear, be regarded in the light of an ordinary notice to a company in which shares are held, for it was a notice to a trading company which claimed a *lien* over the shares in respect of debts which might become due to it from the shareholder as a customer.[1] The view that in such a case notice to the Company of a pledge of the shares was by virtue of s. 30 ineffectual for any purpose is unsound. "It may not have affected the Company with any trust in favour of the pledgees, but it was a valid and operative intimation to the Company that the whole beneficial interest of the shareholder had been pledged to the Bank."[2] It was enough for the Bank to show that the Company had by its agents who managed its trading transactions such knowledge that their customer "had ceased to be the owner of the shares as would have made it unjust to allow him credit on the faith of that property, . . . which he had parted with before they were asked to allow him to incur the debt for which they now seek priority."[3]

Blank Transfers.

Mention has already been made of the common practice in the case of share certificates of certain kinds for a transferor to sign the form of transfer indorsed on the certificate without filling in the name of a transferee and for it then to pass from hand to hand by mere delivery.[4] The effect of executing transfers in blank and handing them from one person to another differs in different cases, for shares are not all legally transferable in the same way:—A. Some requiring to be transferred by deed; while B. Others are transferable by writing not under seal. Each of these we will now consider in their order.

A. *When Deed is necessary for Transfer.*

In the case of certain companies—either by virtue of some statutory provision (as, for instance, those governed by the

[1] Cf. *ante*, p. 126, and n. [2], *ibid.*

[2] *Per* Lord FitzGerald, 12 A.C. at 40.

[3] *Per* Lord Blackburn, *ibid.* at 38.

[4] *E.g.* certificates of American Railroad Companies, see *ante*, p. 105.

Companies Clauses Consolidation Act, 1845,[1]) or under their charter, or their articles of association—a legal transfer can only be effected by deed. If, then, the holder of such shares executes a transfer in blank, it is not valid unless it be re-delivered by him after the blanks are filled in—without which it is not deemed to be his deed.[2]

Moreover, in the case of most companies a complete legal title to shares is not obtained until the transferee becomes registered as owner, and in order to obtain registration he is usually required to produce the share certificate.[3]

These propositions are illustrated by the case of *Société Générale de Paris v. Walker*.[4] In that case A. was the registered owner of 100 shares in the Tramways Union Company, a company registered under the Companies Act, 1862. Under the articles of association the shares were transferable only by deed, and no transfer was to be registered until the certificate should have been delivered at the Company's office, except in case of loss, upon proof, or failing proof upon indemnity satisfactory to the Board. A. executed a transfer of them in blank, and deposited the transfer and his share certificates with B. as security for a debt. A. then executed another transfer in blank as regards the name of the transferee and the numbers of the shares, and deposited it at his Bank, describing it in a memorandum sent therewith as a "transfer for 100 Tram Unions," and stating that he had lost or mislaid the share certificates. The name of an officer of the Bank and the numbers of the shares were afterwards inserted in this last transfer, and it was sent to the Company for registration, but B.'s executors having given the Company notice of their title, the Company refused to register the Bank's nominee.

In an action by the Bank against the Company and B.'s executors, claiming a declaration that the Bank was entitled to the shares and delivery of the certificates, it was held that it was not so entitled, for it had acquired neither the legal nor the equitable title to the shares—clearly not the legal title, since the transfer, not having been re-delivered by A. after the blanks were filled in, was void as a deed; and not the equitable title, because there was nothing to displace B.'s prior equitable title. Even if the deed of transfer had been duly executed, the Bank would merely have got an inchoate legal title incomplete until registration; and never having had possession of the share certificates, could not have compelled the Company to register it as owner. A company on re-

[1] Ss. 14, 15.

[2] *Société Générale de Paris* v. *Walker* (1885), 11 A. C. 20, 28, 29, 40, 42, 43, H.L.; 14 Q. B. D. 424, 442, 449, C. A.; set out *infra*; *Powell* v. *London & Provincial Bank* (1893) 2 Ch. 555, C. A.; set out *post*, p. 132.

[3] See the case next set out; and *Nanney* v. *Morgan* (1887), 37 Ch. D. 346, C. A.; and *Roots v. Williamson* (1888), 38 Ch. D. 485.

[4] (1884), 14 Q. B. D. 424, C. A.; aff. in H. L. (1885), 11 A. C. 20.

ceiving a transfer for registration, even where it is in order, accompanied by the certificate, is not bound to register it at once, but has a reasonable time for making inquiries. In this case, the Company after receiving notice of B.'s title could not properly have registered the Bank's title; and indeed such registration, if made, could not have affected B.'s prior right.[1]

That registration without a preceding legal transfer cannot give a valid title is clearly illustrated by the case of *Powell v. London and Provincial Bank*,[2] in which one Edwards, the sole executor of a trustee, was the registered holder of £1,000 stock of a Company, which was part of the trust fund. This stock was transferable only by deed, which when duly executed was to be delivered to the secretary to be registered. Edwards fraudulently deposited with the defendant Bank to secure an overdraft a deed of transfer executed by him in blank as regards a transferee, together with the stock certificate and a loan note undertaking to execute a transfer when required, and assured the Bank that he was absolute owner of the stock. The Bank, having no notice of the trust, afterwards inserted their own name as transferee, executed the deed, and got it duly registered by the Company, of which Edwards was informed. It was held that the deed being invalid, the Bank got no legal title, and no equitable title which could displace the prior equitable title of those interested in the trust fund.

If, then, where a legal transfer can only be effected by deed, a transferor executes a deed in blank, it is ineffectual as a transfer, and he continues to be the legal owner, and the holder of the invalid deed acquires no legal title, and not necessarily a good equitable title.[3] If, however, no one has a prior equitable right, he will acquire a good equitable title, and a right to have the shares or stock legally transferred, or the transferor declared a trustee of them for him.[4]

Again, such a transfer executed in blank, though invalid as a deed, and therefore ineffectual as a transfer, may be evidence of a binding *agreement* to transfer;[5] and where such an agreement has been made, the seller ceases to be the *equitable* owner of the shares, and both he and the buyer can be compelled to execute a proper transfer.[6] On the other hand, it is not conclusive evidence of such

[1] See *per* Lord Selborne, 11 A. C. at 28-30, and *per* Lord Blackburn, at 35, 41.

[2] (1893) 2 Ch. 555, C. A.

[3] See the two preceding cases.

[4] *Nanney* v. *Morgan* (1887), 37 Ch. D. 346, C. A.

[5] Re *Barned's Bank*. Ex parte *Contract Corporation* (1867), L. R. 3 Ch. Ap. 105.

[6] See Lindley on Comps. 6th ed. I, 655, and authorities cited.

an agreement, and unless such an agreement can be proved, or the transferor has so acted as to be estopped from disputing its validity,[1] such an incomplete transfer will give the holder no title to or right in respect of the shares.[2]

Thus, in *Tayler v. Great Indian Peninsular Railway Company*,[3] the plaintiff who was holder of 120 £20 shares in the Company, and afterwards became entitled to 60 £2 shares, instructed his broker to sell the latter. The shares required to be transferred by deed, and the broker got the plaintiff to execute deeds of transfer in blank, with stamps sufficient to cover the £20 shares, and having fraudulently obtained the £20 share certificates, and filled in the blanks with the numbers of those shares, still leaving the names of the transferees in blank, sold them to buyers who filled in their own names as transferees. It was held that the transfers thus being invalid, and there being no agreement *by the plaintiff* to sell those shares, he was not estopped by his imprudence in executing the deeds in blank, as against buyers who had taken them in that state, from disputing the validity of the transaction, and was entitled to the shares and to have the transfers declared void and delivered up to be cancelled, and to restrain the registration of the names of the buyers as transferees.

B. *When Deed is not necessary for Transfer.*

Where there is nothing in the articles of association of a company, or in any Act of Parliament or charter by which it is governed, which requires a transfer of its shares to be by *deed*, an instrument of transfer signed in blank may operate as a legal transfer, even though it purports to be by deed, and though the uniform practice of the company is to require a deed.[4]

But whether such an instrument will operate as a legal transfer or not must depend on the surrounding circumstances.

If a registered shareholder *sells* his shares and hands over such a blank transfer with the share certificate to a buyer, these documents may be passed on to subsequent buyers, the ultimate holder filling in his own name, and thus getting a valid transfer which enables him to be registered as the owner. Such transactions are

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[1] As to estoppel, see *post*, pp. 145, 155.

[2] See the next case.

[3] (1859), 4 De Gex & Jones' Rep. 559; 28 L. J. Ch. 285; aff. *ibid.* 709. See to the same effect, *Swan v. N. B. Australasian Co.* (1863), 2 Hurlstone & Coltman's Rep. 175, Ex. Ch.; *post*, p. 155.

[4] Re *Tahiti Cotton Co.* Ex. parte *Sargent* (1874), L. R. 17 Eq. 273 (Jessel, M.R.); Re *Tees Bottle Co. Davies' Case.* (1876), 33 L. T. 834; aff. in C. A., see 47 L. J. Ch. at 171; *Ortigosa* v. *Brown* (1878), 47 L, J. Ch. 168. The criticism of Ex parte *Sargent* by the C. A. in *France* v. *Clark* (1884), 26 Ch. D. at 265, does not appear to affect this point.

of daily occurrence, and give rise to no difficulty where each step in the transaction is honest and in accordance with the real intention of the parties to it.[1]

But if, instead of selling, the shareholder signs and hands over such a blank transfer with the share certificate by way of *pledge* or *equitable mortgage* to secure a certain sum, the holder of the documents, having in this case a limited interest only, is not entitled to deal with them as owner, and if he—the pledgee—without the pledgor's authority hands over the documents in the same state to another, either as security for a larger sum or by way of sale, the person so taking them cannot (except in one case about to be mentioned[2]) as against the original pledgor retain the shares for any larger amount than is due from him to his pledgee.[3]

Filling up Blanks before Transfer Over.

If, however, the original pledgee instead of handing over the blank transfer, fills in the name of a transferee to whom he sells the shares, and who, without notice of what has taken place, takes in good faith what appears to be a complete transfer together with the share certificate, it is conceived that the transferee will be entitled (subject to any conditions in the Act or regulations governing the company[4]) to become a registered shareholder, and that the original pledgor will be estopped from disputing the transfer.[5]

Again, if the original pledgee fills in his own name as transferee and procures himself to be registered as owner, his title as owner is apparently perfect; and although so long as he holds the shares they are subject to redemption, yet if he then transfers them to a *bonâ fide* purchaser for value without notice of his real title, his mortgagor will, it is conceived, be without redress against such a purchaser.[6]

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[1] Lindley on Comps., 5th ed. 475; 6th ed. I, 657-658.

[2] *I.e.* in the case of the certificates of American railroad shares; see *post*, p. 135.

[3] *France* v. *Clark* (1884), 26 Ch. D. 257, C. A.; foll. in *Fox* v. *Martin* (1895), 64 L. J. Ch. 473, where the documents were handed to a broker for *sale*, and improperly pledged by him to secure his own debt.

[4] See *ante*, p. 121.

[5] See *per* Turner, L. J., in *Tayler* v. *Great Indian Pen. Ry.* (1859), 4 De Gex and Jones' Rep. at 574; 28 L. J. Ch. at 715.

[6] This view is held by Lord Lindley, who cites in support of it the judgments in *France* v. *Clark* (1884), 26 Ch. D. 257, C. A.; *Société Générale de Paris* v. *Walker* (1885), 14 Q. B. D. 424; aff. in H. L. 11 A. C. 20; set out *ante*, pp. 131-132; *Roots* v. *Williamson* (1888), 38 Ch. D. 485; and *Robinson* v. *Montgomersh. Brewy.* (1896) 2 Ch. 841. Lindley on Comps. 5th ed. 478; 6th ed. I, 661.

Person taking Instrument in Blank when affected with Notice.

It has been stated as a general proposition that a person who without inquiry takes from another an instrument signed in blank by a *third party*, and then himself fills up the blanks, cannot claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument. He must, in ordinary cases, necessarily have had notice that the person from whom he received it was not the owner, for the document itself showed this.[1]

To this general rule there is, however, an exception in the case of the share certificates of American Railroad Companies with indorsed transfers, which, when executed by the registered owner in blank, are regarded, according to the usage of stockbrokers and bankers, as being "in order"; and when sold are in this state commonly passed by mere delivery from hand to hand.[2] Such being the common practice, the document cannot be said to show on its face that the intermediate transferor is not the owner, and the person who takes such a transfer for value cannot be said necessarily to have notice that he is not the owner.[3]

Consequently, if such a transfer executed in the manner described is deposited by the owner with brokers or bankers either as a security, or for safe custody, and afterwards passes into the hands of one who takes it for value in good faith, he will get a good title as against the owner.[4]

In dealing with the various classes of documents under consideration we have seen that under some circumstances the owner is estopped from disputing the validity of a transfer made without his authority. It has also been seen that for a transferee to obtain a good title it is necessary that he should act in good faith. The subjects of estoppel and good faith will be more fully considered in the next Lecture.[5]

Note on Usury.

Usury, by which, it must always be remembered, was formerly meant the taking of interest for money—not necessarily *excessive* interest[6]—was in ancient times strongly condemned. The first

[1] *Per* C. A., *France* v. *Clark* (1884) 26 Ch. D. 257.

[2] See *ante*, p. 105; and *cf. post*, pp. 157, 158.

[3] See the references in the next note.

[4] *Bentinck* v. *L. J. S. Bank* (1893) 2 Ch. at 144-145, *coram* North, J.; and the dicta to the same effect of Lords Watson and Herschell in *Colonial Bank* v. *Cady* (1890), 15 A.C. at 278, 285; and *post*, p. 158.

[5] *Post*, pp. 145 *et seqq.*

[6] See Johnson's Dict. (1818) "Usury," and Bacon's Essays. Annot. by Whateley, "Of Usury," (1876) p. 442; *cf.* Coke, 3 Institute, 150, c. 78.

borrowers must have been for the most part men driven to this necessity by the pressure of want, and contracting debt as a desperate resource without any fair prospect of ability to pay.[1] The general law of debt which is found in the East, among the Greeks and the Northern nations, as well as among the Romans, was that the person who borrowed money pledged himself and his family for the debt.[2]

Among the ancient Egyptians, according to Herodotus, the borrower could pledge his father's body, which gave the lender authority over his sepulchre, so that until the debt was repaid he could not bury there any member of his family, nor himself be buried there or in any other tomb.[3]

A graphic illustration of the practice and effect of usury in ancient times is furnished by the account of the building of the second temple at Jerusalem, the reasons for borrowing being famine and tribute, and the result the mortgaging of all property and the bringing of sons and daughters into bondage—a state of things which roused the anger of Nehemiah, who made the nobles and rulers restore the lands and the hundredth part of the money and produce to the people.[4]

In ancient Greece we find similar examples of the evil effects of usury, and a law of bankruptcy resting on slavery. In Athens in the time of Solon (594 B.C.) the bulk of the population through borrowing had practically become slaves. Solon effectually reformed this state of things by proclaiming a general seisachtheia, or shaking off of burdens, cancelling all debts made on the security of the land or the person of the debtor, and enacted that henceforth no loans could be made on bodily security, and the creditor was restricted to a share of the property, while leaving the rate of interest to be determined by free contract.[5]

In Rome the same difficulties arose and were never successfully met. The mass of the people who were yeomen became hopelessly in debt.[6] Avarice and usury were among the darling sins of the

[1] Grote's Hist. Greece, Vol. 3, p. 144.

[2] Niebuhr's Lectures, Hist. Rome, ed. by Dr. Schmitz, 3rd. ed. (1853), Vol. 1, p. 132.

[3] Rawlinson's Herod. Bk. II, c. 136.

[4] Nehemiah, V, 1–12. The Hebrew word, *nesheo*, usury, is quaintly derived from *nashac*, to bite, because it resembles the bite of a serpent: see A. Clarke's Comnts. Exod. XXII, 25.

[5] Grote's Greece, Vol. 3, pp. 126 *et seqq*, where will be found a vast collection of learning on the subject. At pp. 148–149 the striking resemblance is pointed out in detail between the proceedings of Nehemiah and the seisachtheia of Solon.

[6] See Encyc. Britan., "Usury." Livy relates how Appius Claudius, the decemvir (451 B.C.), used to call the debtors' prison which he had built the "residence of the Roman commonalty"—*domicilium plebis Romanæ* : lib. 3, § 57.

Romans.[1] It would be difficult to over-estimate the importance of the influence of usury on the social and economic history of the Roman Republic.[2] By the law of the Twelve Tables (451 B.C.) interest was limited to 10 per cent.; and in 341 B.C. usury was forbidden altogether among Roman citizens; but this law was constantly evaded by making loans in the names of foreigners and transacting the business at a neighbouring town.[3] In the provinces the spirit of usury found no obstacles at all. The property of the State—*Publicum Romanum*—had (about 200 B.C.) been immensely extended, and portions of it were let to farm to *publicani* —some of the wealthiest Roman citizens—who by advancing money to the State acted as public bankers, and are said to have made profits as great as speculators in modern times. Whenever a war contribution was levied, the money was raised by *publicani* at rates of 12, 24 and even 36 per cent.[4] At length, after many futile attempts to prevent the exaction of interest, the idea was abandoned; and (probably about 84 B.C.) 12 per cent. became the recognised rate. Justinian (529 A.D.) reduced the legal rate for persons of illustrious rank to 4 per cent., for ordinary persons to 6 per cent., for merchants to 8 per cent., and for maritime insurance (hitherto unrestricted while the vessel was at sea) to 12 per cent.[5]

It is not unnatural, considering the evils, including bankruptcy and slavery, which were brought about by usury in early times, that it met with universal condemnation by philosophers and moralists. According to Aristotle usury is most reasonably detested, since money was devised for the sake of exchange, but

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[1] Niebuhr's Lects., Vol. 1, p. 279; *cf. ibid.* pp. 410–411.

[2] Lord Macaulay, in his Preface to the Lay of Virginia, gives a graphic description of the Roman Law of debt which he characterizes as the most horrible ever known, whereby the great men held a large portion of the community in dependance by means of advances at enormous usury. "The liberty, and even the life, of the insolvent were at the mercy of the Patrician money lenders. Children often became slaves in consequence of the misfortunes of their parents. The debtor was imprisoned, not in a public gaol under the care of impartial public functionaries, but in a private workhouse belonging to the creditor. Frightful stories were told respecting these dungeons. It was said that torture and brutal violation were common; . . . . that brave soldiers, whose breasts were covered with honourable scars, were often marked still more deeply on the back by the scourges of high-born usurers." In the Lay itself the Plebeian poet is made to say:

> "Still, like a spreading ulcer, which leech-craft may not cure,
> Let your foul usance eat away the substance of the poor."

[3] See Smith's Dicty. Antiquities, "Fenus;" Niebuhr's Lects., Vol. 1, p. 411.

[4] Niebuhr's Lects., Vol. 2, p. 200; Smith's Antiqs. "Publicani."

[5] Smith's Antiqs. "Fenus;" Gibbon's Roman Empire, ed., 1867, Vol. 5, pp. 75–76.

usury multiplies it, hence its name *tokos*,[1] and it is merely money born of money, which is against nature.[2] This idea was generally adopted in classical times,[3] and, having passed into a proverb, was quoted throughout the Middle Ages with approval.[4] Plato forbids all lending upon usury.[5] Cato when asked what he thought of usury, replied "What do you think of murder?"[6] The Koran as well as the Fathers of the Church and the Canon Law absolutely forbade the taking of usury.

The consequence of this condemnation was to throw all the dealing in money, thus forbidden to both Moslems and Christians, into the hands of the Jews, who although commanded not to take usury from their own people or even from resident strangers, were permitted to take it from others.[7] The Jews were noted for their usury as early as the sixth century, and through many subsequent ages their diligence and expertness in all pecuniary dealings recommended them to princes who were solicitous about the improvement of their revenue. To their money lending and consequent wealth may be largely attributed the hatred, jealousy and ill-treatment which they met with in most countries of Europe where their lives as well as their property were in constant danger. Kings, in order to gain at once money and popularity, abolished the debts due to the children of Israel, except a part which they retained as the price of their bounty. Thus St. Louis, who was generally accounted an upright and magnanimous prince, did not disdain to employ this vicarious form of liberality by promulgating an Ordinance (about 1260) whereby "for the salvation of his own soul and those of his ancestors, he releases to all Christians a third part of what was owing by them to Jews."[8] The Jews were banished at various times from France, and in 1290 in the reign of Edward I from England, where they did not obtain legal permission to reside

[1] The Greek word for usury *tokos*, like the Latin *fenus*, means that which is brought forth.

[2] Politics, I, c. 10.

[3] See Grote's Greece, pp. 144 *et seqq.*

[4] Encyc. Britan. "Usury;" *cf.* Bacon's Essay "Of Usurie"; and Shakespeare's "breed of barren metal": Merchant of Venice, Act 1, sc. 3.

[5] De Legg. V, §§ 742–744.

[6] Cicero, De Offic. II, 25. The view that taking usury was a crime equal to murder, if not worse, was held by many in comparatively modern times, as late as the reign of James I: see Comyn's Law of Usury (1817), p. 3.

[7] Levitic. XXV, 35–36; Deuteron. 19–20; *cf.* Grote's Greece, Vol. 3, p. 148; Madox' Hist. of the Exchequer, Chap. 7.

[8] See Hallam's Middle Ages, ed. 1860, Vol. 3, pp. 338–339. For an account of the widespread agitation against the Jews which prevailed over the greater part of Europe in the last quarter of the Nineteenth Century, see Encyc. Britan. (1902) Vol. 25, "Anti-semitism."

again until the time of Cromwell, more than 350 years later. Early in the Thirteenth Century the merchants of Lombardy and of the south of France took up the business of remitting and lending money, and gradually established themselves in every country. In 1345 two great companies of Florence, the Bardi and the Peruzzi, became bankrupt, Edward III owing the former in principal and interest 900,000 and the latter 600,000 gold florins. The Bank of Venice was established in the Twelfth Century, and the Bank of Genoa in the Fourteenth, and the Bank of St. George was incorporated in Genoa in 1407, and became the sole national creditor and mortgagee. The earliest bank of deposit, instituted for the accommodation of private merchants, is said to have been that of Barcelona in 1401.[1]

In England, at least as early as the time of King Alfred, who exhorted the creditor to lenity,[2] usury was, and for many succeeding centuries continued to be, an object of hatred and animadversion. In the process of time, however, here as elsewhere public opinion on the subject was undergoing a gradual change, and even before the expulsion of the Jews, in spite of the Canon Law, Christians had begun openly to lend money on usury, a distinction being made between lending at a moderate and at an exorbitant rate.[3] The majority of loans on interest no longer presented the repulsive idea of making profit out of the distress of others, but were required for profitable employment by borrowers with full prospect of repayment.[4] In the progress of society borrowing for commercial purposes was always assuming greater importance. At the time of the Reformation, while Luther (about 1530) condemned all usury, Calvin regarded it as permissible.[5]

About 1623, while the subject was undergoing much discussion, Bacon wrote his Essay on Usurie, in which after setting out the "witty invectives" that many had made against it, he comes to the conclusion that it must be permitted as a concession because of the hardness of men's hearts. "Were it not for this easie borrowing upon interest, men's necessities would draw upon them a most sudden undoing. . . . I remember a cruell moneyed man in the country that would say: The Devill take this usury, it keepes us from forfeitures of mortgages and bonds. . . . It is a vanitie

[1] Hallam's Middle Ages, Vol. 3, pp. 339–341.

[2] Thorpe's Ancient Laws of England, Vol. 1, p. 53; *cf.* Comyn's Law of Usury (1817), p. 1.

[3] Hallam's Middle Ages, Vol. 3, p. 339.

[4] *Cf.* Grote's Greece, Vol. 3, pp. 145, 147.

[5] See Dugald Stewart's Dissertns. (1829), pp. 29–30, and an interesting extract from one of Calvin's letters, severely criticizing Aristotle's dogma, *ibid.* Note B, p. 442.

to conceive that there would be ordinary borrowing without profit; and it is impossible to conceive the number of inconveniences that will ensue if borrowing be cramped. Therefore, to speake of the abolishing of usury is idle. All states have ever had it in one kinde or rate or other, so as that opinion must be sent to Utopia. . . . Two things are to be reconciled. The one that the tooth of usurie be grinded that it bite not too much.[1] The other that there bee left open a meanes to invite moneyed men to lend to the merchants for the continuing and quickning of trade." Finally he recommends that there be two rates of usury: a general one of 5 per cent., and a higher rate for persons licensed to lend to merchants.[2]

In Holland Grotius at this time was demonstrating the unreasonableness of the general opinion, and pointing out that the value of borrowing either money or goods for a time was something susceptible of estimation: "for he pays less who pays late."[3] A few years later Coke, on the other hand, expressed the opinion that usury was against the laws of God, of the realm, and of nature.[4] In 1665 Hale, then Lord Chief Baron of the Exchequer, laid down that all usury was not prohibited at common law but only Jewish usury, which was 40 per cent and more.[5] In 1691 Locke demonstrated the futility of the Usury Laws,[6] and in 1787 Bentham strongly advocated similar views.[7] The most eminent writers had pointed out, not only their utter futility to effect their purpose, but their highly mischievous effect in aggravating the evil they were intended to prevent. The experience of several commercial crises had demonstrated, that in consequence of the law attempting to prevent people paying more than 5 per cent. for the use of money, they often had to pay 50, 60, or 70 per cent. by the methods they were forced to adopt.[8] Finally the Usury Laws were abolished in 1854.

Those laws themselves illustrate the gradual but varying develop-

[1] *Cf.* the Hebrew word for usury, n.[4], p. 136, *ante*.

[2] *Cf.* the rates prescribed by Justinian's Code, referred to *ante*, p. 137. In Holland at this time the rate of interest was 8 per cent. in common loans, and 12 per cent. to merchants.

[3] The Rights of War and Peace, pub. 1625, trans. ed. 1738, Bk. II, c. 12, § 20, p. 306. See too his Introduction to the Law of Holland, and Letter 953 to Salmasius, *ibid.* p. 307; and *cf.* Noodt's treatise *De Fœnore et Usuris*, lib. 1, c. 6, to the same effect.

[4] 3 Inst. 153, written 1628–1633.

[5] Hardres' Rep. 420.

[6] See his Considerations of the Consequences of Lowering the Interest of Money.

[7] Defence of Usury.

[8] Macleod's Theory and Practice of Banking, Vol, I, pp. 178–179.

ment of opinion with respect to the morality and practice of usury in this country.

An Act against Usury of 1487[1] after reciting: "For somoch as ymportable damages losses and enpoverysshyng of this realme ys had by dampnable bargayns groundyt in usurye colorde by the name of newe Chevesaunce contrarie to the lawe of naturell justis to the comen hurt of this land and to the greate displesur of God": prohibited all "drye exchaunge" or taking of usury, and declared all such bargains to be utterly void, and inflicted a penalty of £100 on the bargainer "reservyng to the Church (this punysshement notwithstondyng) the Correccion of their Soulles accordyng to the lawes of the same."

Eight years later, in 1495,[2] the former Act was repealed as being too "obscure derke and diffuse," and it was provided that lending money upon usury, (saving lawful penalties for non-payment) or making a bargain respecting goods or lands grounded upon usury, should cause the lender to forfeit half the value of such money, goods or lands.

In 1545 an Act[3] was passed, which, after again reciting that the former Statutes for the avoiding and punishment of usury were "soe obscure and darke" and "of so litle force and effect that by reason thereof litle or noe punyshment hath ensued to the offendors . . . but rather hath encouraged them to use the same," repealed those Statutes, and in phrases which certainly seem not less "obscure, dark and diffuse" restricted the rate of usury to 10 per cent.

Seeing that the latter Act, although intituled "A Bill against Usury," in fact legalized the taking of usury while limiting the rate, there seems little wonder that in 1552 it was found necessary to declare by Statute[4] that the Act of 1545 was not intended for the "allowance of usury, as divers persons blinded with inordinate love of themselves have and yet do mistake the same"; and all usury was again forbidden "as a vice most odious and detestable."

But human nature is unfortunately so weak that in 1570[5] the Legislature had to confess that the "latter Act hath not done so much good as was hoped it should, but rather the said vice of usury, and specially by way of sale of wares and shifts of interest, hath much more exceedingly abounded, to the utter undoing of many gentlemen, merchants, occupiers and others, and to the importable

[1] 3 Hen. VII, c. 5. From the provisions of this and some of the later Statutes some of the early devices for defeating the usury laws are clearly seen—such as for the lender to pretend to sell goods and not to deliver them, or to deliver them and immediately buy them back at a lower price: acts expressly prohibited.

[2] 11 Hen. VII, c. 8.

[3] 37 Hen. VIII, c. 9.

[4] 5 & 6 Edw. VI, c. 20.

[5] 13 Eliz., c. 8

hurt of the Commonwealth"; and while still declaring that all usury "is sin and detestable," revived the Act of 1545, limiting usury to 10 per cent. In 1623[1] this rate was declared too high, and reduced to 8 per cent., and to satisfy the scruples of the Bishops a proviso was added "that no words in this law contained shall be construed or expounded to allow the practice of usury in point of religion or conscience." In 1660[2] the rate was reduced to 6 per cent., and in 1713 "An Act to reduce the rate of interest without any prejudice to Parliamentary Securities"[3] further reduced it to 5 per cent.

This Act, which fixed legal interest at 5 per cent., and had the effect of extending the Usury Laws to Scotland,[4] was known for many years as the Statute of Usury, and subject to some relaxation in favour of Irish and Colonial securities,[5] of pawnbrokers' pledges,[6] of bills of exchange and promissory notes,[7] and in 1839 of all contracts not relating to land,[8] remained in force for 140 years, from 1714 to 1854. The Statute recited that the reduction of interest to 10, and thence to 8, and thence to 6 per cent. had "by experience been found very beneficial to the advancement of trade and improvement of lands," and that it was "absolutely necessary to reduce the high rate" of 6 per cent. "to a nearer proportion with the interest allowed for money in foreign States;" and proceeded to prohibit and render void all contracts for a higher rate of usury than 5 per cent., and to subject any person who actually took more than that rate to the forfeiture of treble the value of the principal. The Act did not, however, extend to contracts made out of England, and our Courts directed the payment of interest according to the rate allowed in the country where the contract was made. Thus Irish, American, Turkish, and Indian interest, were allowed to the amount of even 12 per cent.; for, as was sagely observed, the refusal to enforce such contracts would put a stop to all foreign trade.[9]

The Statute of Usury, and also all other laws, imposing penalties for taking high rates of interest, were repealed by the Act of

[1] 21 Jac. I, c. 17.

[2] 12 Car. II, c. 13.

[3] 12 Anne, stat. 2, c. 16.

[4] *Surtees* v. *Allan* (1814), 2 Dow's Rep. 254, H.L.

[5] (1774) 14 Geo. III, c. 79, and amending Acts of 1821 and 1822.

[6] (1800) 39 & 40 Geo. III, c. 99, s. 2.

[7] (1818) 58 Geo. III, c. 93; (1833) 3 & 4 Will. IV, c. 98, s. 7; (1835) 5 & 6 Will. IV, c. 41; (1837) 1 Vict., c. 80; (1839) 2 & 3 Vict., c. 37.

[8] 2 & 3 Vict., c. 37; see *per* Parke, B., in *Thibault* v. *Gibson* (1843), 12 Meeson & Welsby's Rep. at 96.

[9] Blackstone's Comnts. Vol. 2, p. 464. All the Usury Acts, and the decisions, together with much curious legal information on the subject, are to be found in Comyn's Law of Usury (1817).

1854,[1] which simply recites that "it is expedient to repeal the laws at present in force relating to usury."[2] Although since the Act of 1854, any rate of interest agreed upon between the parties is lawful, yet if the agreement is induced by the fraud of one of the parties, the other party on discovering the fraud can repudiate the contract.[3] On the ground of fraud or unfair dealing, the Courts of Equity have always been willing to relieve expectant heirs and others in a similar position from unconscionable bargains, and the doctrines of equity respecting such bargains have not been affected generally by the repeal of the Usury Laws.[4]

By the Money Lenders Act, 1900,[5] in proceedings taken by a money lender, as defined by the Act, the Court, if satisfied that the interest or charges are excessive, and that "the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief," may re-open the transaction, and relieve the defendant from payment of any sum in excess of what it adjudges to be reasonable;[6] but this is not to affect the rights of any bonâ fide assignee or holder for value without notice.[7]

Even at the present day, interest upon money lent or upon any other debt is not payable as of course. Where interest is expressly reserved it is payable as a *debt;* but where there has been no express reservation, an agreement to pay interest is not implied except upon negotiable instruments by the custom of merchants, or in some other cases by the usage of particular trades, or it may be inferred from the course of past dealings between the parties.[8] In these cases, interest is recoverable in the nature of *damages*,[9] as it also is in cases falling within the Act of 1833[10]—viz., upon all debts

[1] 17 & 18 Vict., c. 90.

[2] These appear to have been contained in eleven English, five Scotch, and four Irish Statutes: see Sched. to Act.

[3] See *e.g. Gordon* v. *Street* (1899) 2 Q.B. 641, C.A.

[4] *Aylesford* v. *Morris* (1873), L.R. 8 Ch. Ap. 484; foll. in *Brenchley* v. *Higgins* (1900), 70 Law Journal Rep. Chancery 788, C.A. In *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126, at 138, Kay, J., did not consider it finally settled how far such repeal has affected the exercise of equity jurisdiction in certain cases of exaction. The principle on which relief is granted is also stated, and the cases are reviewed in *Nevill* v. *Snelling* (1880), 15 Ch. D. 679; and discussed in Robbin's Mortgages, Vol. 1, 131 *et seqq.*, 612 *et seqq.*; and in Brett's Leading Cases in Modern Equity, 4th ed., 70 *et seqq.*

[5] 63 & 64 Vict., c. 51.

[6] S. 1 (1). As to the construction of this provision, see *Wilton* v. *Osborn* (1901) 2 K.B. 110.

[7] S. 1 (5).

[8] See *e.g.* Re *Anglesey*. *Willmott* v. *Gardner* (1901) 2 Ch. 548, C.A.

[9] *Cameron* v. *Smith* (1819), 2 Barnewall & Alderson's Rep. 305.

[10] 3 & 4 Will. IV, c. 42, ss. 28, 29. As to trial with or without a jury, see Rules of the Supreme Court, 1883, Order 36, II, Mode of Trial.

and sums certain if payable by virtue of a written instrument at a certain time; or, if payable otherwise, from the time of demand in writing, provided such demand give notice that interest will be claimed; and in actions for conversion or trespass above the value of the goods taken, and in actions on policies of insurance above the money recoverable. In all such cases, the amount has to be assessed in Common Law Courts by a jury, or, if there is no jury, and also in Courts of Equity, by the Judge, who may allow interest at any rate not exceeding the current rate, or, on the other hand, may allow no interest at all.[1]

It was formerly thought that interest might be given by way of damages at common law in other cases for the wrongful detention of money which ought to have been paid, but the House of Lords has decided that, unsatisfactory as the law is, such damages cannot be given.[2] In Scotland, on the other hand, in an action for money due, interest can be claimed and is decreed as a matter of course; and where money due is demanded and not paid, interest will run.[3]

In England equity follows the law in dealing with legal claims, but it usually decrees interest in cases of purely equitable demands —for instance, in suits against trustees who misapply trust moneys.[4]

Rate of Interest.

With respect to the *rate* of interest, under the Act of 1833, it seems to have been the general practice for a number of years for Judges in directing juries to tell them that they might allow interest at 5 per cent., and for juries to allow it at that rate; but, at the present value of money, this can no longer be deemed to be "the current rate," which is the utmost that the Act allows.[5] In equitable demands, the Judges of the Chancery Division have of late years allowed 3 per cent. as the ordinary rate.[6] Judgment debts bear interest at 4 per cent. from the date of entering up judgment.[7]

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[1] 3 & 4 Will. IV, c. 42, ss. 28, 29; *Attwood* v. *Taylor* (1840), 1 Manning & Granger's Rep. 279; *Webster* v. *British Empire Life Assurance Co.* (1880), 15 Ch. D. 169; and as to the law before the Act, see *Cameron* v. *Smith* (1819), 2 Barnewall & Alderson's Rep. at 308, 309.

[2] *London C. & D. Ry.* v. *S. E. Ry.* (1893) A.C. 429.

[3] *Per* Lord Shand, *ibid.* at 443.

[4] *Per* Lindley, L.J., in *London C. & D. Ry.* v. *S. E. Ry.* (1892) 1 Ch. 120, at 142. As to the rate of interest now allowed in such cases, see *per* Stirling, J., in Re *Barclay*. *Barclay* v. *Andrew* (1899), 1 Ch. at 686.

[5] See *per* Kekewich, J., in *London C. & D. Ry.* v. *S. E. Ry.* (1892) 1 Ch. at 129–130, and *per* LL. JJ. *ibid.* at 136–137.

[6] *Per* Stirling, J., in Re *Barclay* (1899), 1 Ch. at 686; *Rowlls* v. *Bebb* (1900), 2 Ch. 107, C.A.

[7] By the Judgments Act, 1838, 1 & 2 Vict., c. 110, s. 17.

LECTURE VI.

SUMMARY OF LECTURE V. ESTOPPEL. GOOD FAITH. CONTANGOES.

Summary of Lecture V.

STOCK EXCHANGE securities—such as scrip, share and stock certificates, and debentures, including the scrip and bonds for loans to Foreign Governments—were dealt with in my last Lecture, as well as various matters connected with company law, including the limitation of the powers of a company, the transfer of shares and stock, and the effect of transfers in blank. Attention was called to the importance of giving notice of assignments and charges, whether to trustees or debtors or to incumbrancers, and in this connection the equitable doctrine of priority by notice was discussed, and the effect of giving notice to companies was considered.

In the present Lecture I propose to examine at some length the subjects of estoppel and good faith.

Estoppel.

Frequent reference has been made in the course of these Lectures to the doctrine of estoppel, and it has been seen that although a sale or pledge may have been made by one who had received no actual authority from the owner of the goods or shares or stock, yet the owner may under certain circumstances be estopped from disputing the validity of the transaction.[1]

It, therefore, becomes necessary to inquire under what circumstances the owner will be estopped, and to obtain, so far as we can, an accurate idea of what is meant by estoppel.

Estoppel is an admission, or something equivalent to an admission, of so conclusive a nature that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it. He may, however, show that the person relying on it is himself estopped from setting it up; since that is not to deny its conclusive effect

[1] See *ante*, pp. 42, 55, 56, 74, 134; and *cf.* pp. 123, 133.

as to himself, but to incapacitate the other from taking advantage of it.[1]

Different kinds of Estoppel.

Estoppels are of three kinds[2]:—

1. By matter of record—whereby a man cannot dispute a judgment signed against him, though wrongfully, so long as it stands, his remedy being to apply to the Court to set it aside.[3]

2. By deed—whereby a man is not allowed to dispute his own solemn deed.

3. By matter *in pais*,[4] *i.e.* by representations made in the ordinary transactions of life.

Estoppel in Pais.

It is this latter kind of estoppel only with which we are at present concerned.

The general rule with respect to it has been authoritatively laid down thus: "If a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion. If he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist."[5]

Such neglect must be:—

(*a*) in the transaction itself;[6]

(*b*) the proximate cause of leading those parties into that mistake; and

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[1] 2 Smith's Leading Cases, Notes to *Doe* v. *Oliver*, 7th ed. 778; 10th ed. 726.

[2] Much learning on the various kinds of estoppel is collected in the excellent notes to *Doe* v. *Oliver* (1829), and the *Duchess of Kingston's Case* (1776), in 2 Smith's Leadg. Cas., 7th ed., 777; 10th ed., 726.

[3] *Huffer* v. *Allen* (1866), L.R. 2 Ex. 15.

[4] This quaint Norman French term—meaning literally "matter in the country"—survives like many others in our law. Trial *per pais* means trial by the country, *i.e.* by a jury.

[5] *Per* Wilde, B., in *Swan* v. *N. B. Australasian Co.* (1862), 7 Hurlstone and Norman's Rep. 603, at 633; app. as qualified in text by Blackburn, J., in S. C. in Ex Ch. 2 Hurlstone & Coltman's Rep. at 182.

[6] See the *Bank of Ireland* v. *Evans* (1855), 5 H. L. Cas. 389, where leaving the seal of a corporation in the possession of the secretary, who fraudulently affixed it to powers of attorney authorizing the transfer of stock, was held by the H.L. to be, if negligence at all, not negligence in or immediately connected with the transfer itself; and *cf. Swan's Case, post*, p. 155.

(*c*) the neglect of some duty owing to those very parties or to a body in which they are included, and not merely a duty owing to someone with whom they are not privy.[1]

Estoppel distinguished from Cause of Action.

An estoppel does not in itself give a cause of action; it is only a rule of evidence, which prevents a person from denying a certain state of facts.[2]

For this reason if we wish to learn whether one man can sue another, before enquiring whether the latter would be estopped from disputing a certain fact, the first thing to ascertain is whether he has a cause of action supposing the fact cannot be disputed.[3]

Thus, supposing a man suffers damage by relying on a representation which turns out to be untrue. The first thing to ascertain is whether he has a cause of action against the person who made the representation, for misrepresentation does not in all cases give a cause of action to a person who relies upon it to his detriment. If he has no cause of action, estoppel will not avail him, for he cannot base his action upon estoppel alone.

An action to recover damages for deceit can be brought by one man against another who has represented as a fact what he *knows* to be untrue, or what he does not *believe* to be true, with intent to induce the former to act upon it, and he has been thereby induced to act upon it to his loss. In order to sustain such an action it is essential to prove *fraud* and *damage*. If the representation was made by the other recklessly, careless whether it were true or false, he will be liable, because he acted fraudulently since he had no honest belief that it was true.[4]

Again, if he has made a contract with the other party and his representation amounts to a term of the contract or to a warranty, although there may be no fraud, an action will lie for breach of contract or of warranty, or it may be a ground for rescission of the contract, or a good defence to an action for specific performance.

In such cases if the party who is misled sues the other in an action founded on *the representation itself*, the question of estoppel does not arise; since the plaintiff is not, in such an action, treating the representation as *true*, but on the contrary is seeking to recover damages, or to rescind the contract, on the ground that it was *untrue*, and he has to prove that it was untrue.

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[1] These are the qualifications of Blackburn, J., referred to in n. [5], *supra*.

[2] *Per* Lord Esher, in *Seton* v. *Lafone* (1887), 19 Ch. D. at 70; and *per* Lindley and Bowen, LL.JJ., in *Low* v. *Bouverie* (1891) 3 Ch. at 101, 105.

[3] See *per* Bowen, L.J., in Re *Ottos Kopje Mines* (1893) 1 Ch. at 628.

[4] *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 2 Smith's Leading Cas. 7th ed. 64; *Derry* v. *Peek* (1889), 14 A.C. 337, 374.

But if the action is founded upon *the breach of an obligation or duty* to do some act which the person who made the representation would be bound to do if the representation were *true*, he may then be estopped, as against a plaintiff who has been damnified by relying upon it, from setting up that it was untrue.

These propositions may be made clearer by the following cases.

In *Derry v. Peek*,[1] the directors of a Tramway Company had issued a prospectus in which they stated that by their special Act the Company had a right to use steam traction, whereas in fact such right was dependent upon their obtaining the sanction of the Board of Trade, which was afterwards refused. Peek, having taken shares in the Company on the faith of this statement, brought an action for deceit against the directors, claiming damages for fraudulent misrepresentation. Mr. Justice Stirling found that the directors who had fully expected that the necessary sanction would be given, had made the inaccurate statement in the *honest belief* that it was true, and held that in the absence of fraud the action failed. His order dismissing the action was reversed in the Court of Appeal but restored in the House of Lords, where it was finally settled that in an action of deceit the plaintiff must prove actual fraud; and that while an untrue statement, made through carelessness and even without reasonable ground for believing it to be true, may be *evidence* of fraud, it does not necessarily amount to fraud, and that if proved to have been made in the honest belief that it was true it cannot be fraudulent.

In re *Bahia and San Francisco Railway*,[2] Miss Trittin, being the registered holder of five shares in the Company, left the share certificates in the hands of her broker. These certificates, together with a forged transfer to Stocken purporting to have been executed by Miss Trittin, were afterwards left with the secretary for registration; and the secretary, having posted a notice of the transfer to Miss Trittin and receiving no answer, removed her name and placed that of Stocken as holder on the register, and gave him certificates stating that he was the registered holder of the shares. Burton afterwards bought the shares and became registered holder and received new certificates. The forgery having been discovered, the Court under s. 35 of the Companies Act, 1862,[3] ordered the

[1] (1889), 14 A. C. 337, H. L.; revg. C. A. *sub-nom. Peek* v. *Derry* (1887), 37 Ch. D. 541.

[2] (1868), L. R. 3 Q. B. 584; exp. by Bowen, L. J., in Re *Ottos Kopje Mines* (1893) 1 Ch. at 628; app. in H. L. in *Balkis Consol. Co.* v. *Tomkinson* (1893) A. C. at 405. See also *Hart* v. *Frontino, etc., G. M. Co.* (1870) L.R. 5 Ex. 111; Re *Romford Canal Co.* (1883), 24 Ch. D. 85; and *cf. Burkinshaw* v. *Nicolls* (1878) 3 A. C. 1004; and *Bloomenthal* v. *Ford* (1897) A. C. 156; both cases in which the *claimant* was estopped, set out *post*, pp. 162, 163.

[3] As to this section, see *ante*, p. 120, and n.[7] *ibid.*

Company to restore Miss Trittin's name to the register, and upon Burton claiming damages for the loss of the shares, held that the Company's refusal to recognise him as a shareholder after he had paid his money upon the faith of the certificates issued to Stocken gave him a cause of action against the Company, who were estopped from denying the truth of the certificates; and that he was entitled to recover from the Company the value of the shares at the time of such refusal with interest at 4 per cent.

Burton's claim was in effect an action for conversion by depriving him of the use of the shares. If in such an action the Company pleaded that he was not the true owner of the shares, he was entitled to reply that they were estopped from saying so, because he had purchased on a statement of title made by them and intended by them to be acted upon.[1]

In the first of these two cases, it will have been observed, the action was founded on the representation itself, which the plaintiff proved to have been untrue, but did not prove to have been fraudulent, and as fraud was essential to the cause of action, he failed. In the second case, the action was founded on the breach of the Company's obligation to recognise the plaintiff as a shareholder; this afforded him a cause of action, and the Company was estopped from setting up that the representation made in the certificates that his vendor was the registered holder of the shares was untrue.

The two following cases in like manner illustrate the same points respectively.

In *Le Lièvre v. Gould*,[2] Hunt, the owner of land, sold it under a building agreement to Lovering, a builder, who applied to Hunt to make him advances. Hunt arranged with Le Lièvre to advance £850 to Lovering upon the latter giving Le Lièvre a mortgage of the property; and a mortgage was executed which provided that £850 was to be advanced to Lovering "in such instalments as the mortgagee or his surveyor should from time to time certify." Hunt also arranged with Gould, an architect and surveyor, to give certificates as the work reached the stages at which the instalments were to be advanced according to a schedule of advances given to Gould, who however did not know the contents of the mortgage deed. Gould gave to Hunt certificates of the work done "as per schedule of advances," and upon the footing of these certificates Le Lièvre advanced the money. The certificates were in fact inaccurate as to the progress of the work, and Le Lièvre brought an action for damages against Gould, alleging that Hunt in employing him was acting as agent for the plaintiff, that the certificates were untrue to the knowledge of Gould, and that, even if there was no fraud, the defendant acted without due care in giving the certificates *in breach of the duty* which he owed to the plaintiff. On the evidence it

[1] *Per* Blackburn, J., L.R. 3 Q.B. at 597. [2] (1893) 1 Q.B. 491, C.A.

was found that Hunt in employing Gould had not acted as the plaintiff's agent, that there was no contractual relation between the plaintiff and the defendant, and that there was no fraud on the part of the defendant. On these findings it was held as matter of law, that the defendant, although guilty of gross negligence, *owed no duty* to the plaintiff to exercise care in giving his certificates, and therefore that the action, which was founded upon negligence, could not be maintained. Negligent misrepresentation, in the absence of fraud, can give rise to a cause of action only if the defendant owes a duty to the plaintiff not to be negligent; and here although the defendant owed a duty to be careful in giving the certificates to his employer, Hunt, he owed no duty to the plaintiff.

Let us now suppose that in that case Gould had agreed with Le Lièvre to become surety for instalments advanced to Lovering according to the stages of the work specified in the schedule of advances, and that on default of the latter to repay the money Gould had declined to repay it on the ground that the instalments had been advanced before the specified stages had in fact been reached. In this case it is clear that the plaintiff would have had a cause of action founded upon Gould's obligation to repay the money on Lovering's default if the stages had been reached when the instalments were advanced, and, upon his suing him, Gould would then have been estopped from setting up the inaccuracy of his certificates.

In *Henderson v. Williams*,[1] the owners of goods lying at the warehouse of Williams, a warehouseman, were induced by the fraud of Fletcher, who pretended he was agent for Robinson, a well-known customer of theirs, to instruct Williams to transfer the goods to Fletcher's order. Fletcher then sold the goods to Henderson, who after obtaining a statement from Williams that he held the goods at Henderson's order, in good faith paid the price to Fletcher. On discovery of Fletcher's fraud, Williams (being indemnified by the owners) refused to deliver the goods to Henderson, who sued Williams for conversion. It was held that the action lay, and that Williams having attorned to Henderson was estopped from impeaching his title.

In *Le Lièvre v. Gould*, as in *Derry v. Peek*,[2] the defendant had been negligent in making an untrue representation, but in neither case were the defendants guilty of *fraud*, nor did they owe to the plaintiff a duty to be careful; consequently the plaintiff had no cause of action.

In *Henderson v. Williams*, as in the *Bahia Railway Case*,[3] the defendant had been guilty of a breach of *duty* towards the

[1] (1895) 1 Q.B. 521, C.A.; *cf.* *Woodley* v. *Coventry* (1863), 2 Hurlstone & Coltman's Rep. 164; *Knights* v. *Whiffen* (1870), L.R. 5 Q.B. 660.

[2] *Ante*, p. 148.

[3] *Ante*, p. 148.

plaintiff by converting property which he alleged to be his, and in both cases the defendants were estopped from denying the truth of their own representations, which if true went to establish the plaintiff's title.

Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact or state of facts;[1] *e.g.*

Estoppel of Defendant.

1. At law, if the assign of a debt sues the alleged debtor, and he is prevented from denying that the debt is due.

2. In equity, if an assign of A. sues A.'s trustee to recover the fund assigned, and the trustee is prevented from denying its existence in his hands.

Estoppel of Plaintiff.

3. At law, if a Joint Stock Company sues a shareholder for calls, and they are prevented from denying that the shares are paid up.[2]

4. In equity, if the liquidator of a Joint Stock Company which is being wound up seeks to make a shareholder liable for calls, and the liquidator is prevented from denying that the shares are fully paid up.[3]

Lord Blackburn, after referring to a degree of odium which is sometimes thrown on the doctrine of estoppel, said:[4] "The moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which in fact the law of the country could not be satisfactorily administered. When a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais*." One common idea runs through estoppel, namely:—"that your rights, as between yourselves, must be regulated upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act."

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[1] *Per* Kay, L.J., in *Low* v. *Bouverie* (1891) 3 Ch. at 112.

[2] *Ibid.*

[3] *Burkinshaw* v. *Nicolls* (1878), 3 A.C. 1004; set out *post*, p. 162.

[4] *Ibid.* 3 A.C. at 1026.

Grounds of Estoppel in Pais.

Estoppels may arise on various grounds, all of which the judgment in *Carr v. London and North Western Railway*[1] endeavours to state, and each of the four grounds there stated is intended to be independent and exclusive of the others.[2]

Those grounds are as follows:—

1. *Fraudulent Misrepresentation.*

If A., by his words or conduct, wilfully endeavours to cause B. to believe in a certain state of things which A. *knows* to be *false*, and if B. believes in that state of things and acts upon his belief, A. is estopped from averring afterwards that such a state of things did not in fact exist.

2. *Representation, express or implied, intended to be acted upon.*

If A., either in express terms or by conduct, makes a representation to B. of the existence of a certain state of facts which A. intends to be acted upon in a certain way, and B. acts upon it in that way in the belief of the existence of such a state of facts to his damage, A. is estopped from denying the existence of such a state of facts.

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[1] (1875), L.R. 10 C.P. 307, at 316-318, delivered by Brett, J. (afterwards Lord Esher).

[2] *Per* Lord Esher, M.R., in *Seton* v. *Lafone* (1887), 19 Q.B.D. 68, 70. It is submitted, however, that the second and third grounds are not expressed so as necessarily to exclude either fraud or negligence; and for the reason given in the next note, that the third ground is not exclusive of the second.

These grounds are here set out, as the judgment in *Carr* v. *London & N.W. Ry.* is commonly regarded as the *locus classicus* on estoppel, but the statement seems open to criticism for several reasons, and the view may be hazarded that it has not unfrequently led to some confusion by failing clearly to mark the distinction above-mentioned between *estoppel* and a *cause of action*. The first ground appears to include an action of deceit as well as estoppel, and the fourth ground—if by "culpable negligence" is intended the neglect of some *duty* to the plaintiff (as to which, see the observations of Blackburn, J., in *Swan* v. *N.B. Australasian Co.* (1863), 2 Hurlstone & Coltman's Rep. at 182, cited *ante*, p. 147)—appears to include an action for negligence. Lord Macnaghten has recently observed that the doctrine of estoppel by representation "is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr* v. *London & N.W. Ry.* Perhaps some of the difficulties which have gathered round the present case have come from clinging to rules rather than attending to principles": *Whitechurch* v. *Cavanagh* (1902), A.C. at 130.

3. *Representation, implied, reasonably construed to be intended to be acted upon.*

If A.—whatever his real meaning may be[1]—so conducts himself that B., if a reasonable man, would take his conduct to mean a certain representation of facts, and that it was a true representation, and that B. was intended to act upon it in a particular way, and B., believing those things, does so act to his damage, A. is estopped from denying that the facts were as represented.

4. *Negligent Misrepresentation.*

If in the transaction itself which is in dispute, A. has led B. into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause[2] of leading and has led B. to act by mistake upon such belief to his prejudice, A. cannot be heard afterwards as against B. to show that such a state of facts did not exist.

General Principles of Estoppel.

Although the principles upon which estoppel rests are clear, it is sometimes a matter of considerable difficulty to determine whether they are applicable to the facts of a particular case.[3] Additional light may be thrown on the subject by examining some of the principal cases which have come before the Courts.

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[1] It is submitted that this phrase prevents the third ground being necessarily exclusive of the second ground; and that in order to make it exclusive, instead of "whatever his real meaning may be," there should be inserted "although his real meaning was otherwise."

[2] The "proximate cause" here means the "real cause": *per* Lord Esher in *Seton* v. *Lafone* (1887), 19 Q.B.D. at 71.

[3] The difficulty of determining whether in a particular case a party is or is not estopped is illustrated by the striking difference of judicial opinion in some of the cases. Thus, in *Swan's Case*, *post*, p. 155, the Courts of C.P. and Exch. were equally divided, while the Exch. Chamber decided that the plaintiff was not estopped by a majority of six to one—ten Judges in all thus being of that opinion, while five were of the contrary opinion. In *Shropshire Union Rys.* v. *The Queen*, *ante*, p. 122, the judgment of four Judges of the Q.B., deciding that the defendants were not estopped, was unanimously reversed by six Judges in the Exch. Ch., but restored by the three Lords constituting the H.L.—seven Judges in all holding one view and six the contrary. In *Simm* v. *Anglo-American Telegraph Co.*, *post*, p. 160, the decision of Lindley, J., that the defendants were estopped was unanimously reversed in the C.A. In *Bloomenthal* v. *Ford*, the decision of Vaughan Williams, J., that the liquidator was not estopped was affirmed by the C.A., but the decision of those four Judges was reversed by five Law Lords in the H.L.: *post*, p. 163. And in *Farquharson* v. *King*, a case on the alleged sale of goods by a fraudulent clerk, cited *ante*, p. 55, while the C.A. by two Judges to one, reversed the decision of Matthew, J., that the plaintiffs were not estopped from disputing the clerk's authority to sell, the H.L. constituted of five learned Lords unanimously reversed the C.A.—seven Judges in all against two: (1902) A.C. 325.

Attention will chiefly be called to those which illustrate estoppel in connection with the transfer of shares or stock, since they have a special bearing upon our subject; but before coming to the cases in detail, I propose to make one or two general observations.

Estoppel by representation is applicable only to representations as to some state of *facts* alleged to be at the time actually in existence, and not to mere *intention* or *promises* as to the future, which, if binding at all, must be binding as *contracts*.[1]

Whenever the representation is made in words spoken or written, the language upon which such an estoppel is founded must be precise and unambiguous—not necessarily such that it cannot possibly be open to different constructions, but such as if reasonably construed will be understood in a particular sense by the person to whom it is addressed.[2]

In some judgments a view has been expressed that in order to ground estoppel upon a representation it is essential that the representation should be untrue, its truth or untruth being treated as a test of the existence of estoppel.[3] It is, however, submitted that this view is misleading, and that it would be more accurate to say that the truth or untruth of the representation is immaterial,[4] although, no doubt, where estoppel is raised, the untruth of the representation is commonly assumed;[5] and it is only when the party who has made the representation proposes to show that it was untrue that estoppel is called into play. If the truth of the representation is admitted, the aid of estoppel is not needed. If A. has so acted that he is estopped as against B. from denying the existence of the facts represented, he cannot call evidence to show whether those facts did or did not exist. It would be of no advantage to him to show that they did exist, and he is prevented from showing the contrary. If he could call evidence on the point, it

[1] *Jorden* v. *Money* (1854), 5 H.L. Cas. 185; *Maddison* v. *Alderson* (1883), 8 A.C. at 473, H.L.; *Chadwick* v. *Manning* (1896), A.C. 231, P.C.

[2] See *per* Bowen, L.J., in *Low* v. *Bouverie* (1891), 3 Ch. at 106; and *Colonial Bank* v. *Cady* (1890), 15 A.C. 267, set out *sub nom. Williams* v. *Colonial Bank*, *post*, pp. 157, 158.

[3] See *e.g. per* Bramwell, L.J., in *Simm* v. *Anglo-Amer. Tel. Co.* (1879), 5 Q.B.D. at 202; and *per* Lord Halsbury, L.C., in *Farquharson* v. *King* (1902), A.C. at 330, H.L.

[4] Thus Lord Denman, C.J., speaking of estoppel by *deed*, said: "The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel *may* exclude the truth": *Bowman* v. *Taylor* (1834), 2 Adolphus and Ellis' Rep., at 289-290.

[5] "The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances": *per* Brett, L.J., in *Simm* v. *Anglo-Amer. Tel. Co.* (1879), 5 Q.B.D. at 206.

might be a difficult question for a jury to decide whether the facts did or did not exist; but such evidence is wholly immaterial and therefore inadmissible, on the ground that having made the representation, whether true or untrue, he is estopped from disputing it.

Estoppel of Shareholder.

The question whether a person, who has executed blank transfers of shares and entrusted them to another who has dealt with them fraudulently, has acted so negligently as to be estopped from disputing the validity of the transaction has already been touched upon.[1]

The leading case on the kind of negligence which will prevent the person guilty of it from recovering shares wrongfully transferred from his name is that of *Swan v. North British Australasian Co.*[2] The plaintiff was the registered owner of shares in the defendant Company, and also of shares in another company, all of which shares could be transferred only by deed. He employed a broker to sell the latter shares only, and was induced to give the broker transfers executed entirely in blank. The broker, having stolen the certificates, fraudulently filled up some of the transfers with the particulars of the shares in the defendant Company and with the names of bonâ fide purchasers for value as transferees, and they subsequently got themselves registered as owners in place of the plaintiff.

An action by the plaintiff for a mandamus commanding the defendants to replace his name on the register was decided in his favour,[3] on the ground that the transfers were void, and that there was no such negligence on his part as estopped him from showing this. The proximate cause which induced the defendant Company to alter their position to their prejudice was the fraudulent conduct of the broker, and not the negligence of the plaintiff. There was indeed no negligence in his not providing against the theft and forgery of the broker, without which the act of the plaintiff would not have affected these shares.

It will be noticed that the facts in this case were very similar to those in *Tayler v. Great Indian Peninsular Railway*,[4] except that in that case the transfers had not been actually registered; and

[1] *Ante*, p. 133.

[2] This came before the Courts of Common Pleas, Ex parte *Swan* (1859), 7 Common Bench Rep. N.S. 400; Exchequer, *Swan* v. *N. B. Australasian Co.* (1862), 7 Hurlstone and Norman's Rep. 603; and Exchequer Chamber (1863), 2 Hurlstone & Coltman's Rep. 175. As to the conflict of judicial opinion in this case, see n. [3], p. 153, *ante*.

[3] In Ex. and Ex. Ch.

[4] (1859), 4 De Gex & Jones' Rep. 559; set out *ante*, p. 133.

therefore it was the buyers of the shares only, and not (as in this case) the Company, who unsuccessfully tried to raise an estoppel against the plaintiff.

Similar unsuccessful attempts to raise an estoppel on transfers executed in blank were made in the two following cases—the transfers being those of an American Railroad Company.

In *Colonial Bank v. Hepworth*,[1] the defendant employed Thomas and Co., stockbrokers, to buy for him 250 shares in an American Railroad Company, which they did, and received from the sellers the share certificates with the indorsed transfers signed in blank. The certificates were in the common form, and the transfer required merely to be signed—not to be by deed.[2] Thomas & Co. were allowed to retain these documents for the sole purpose of procuring registration in Hepworth's name. First, however, they fraudulently deposited them with the plaintiff Bank to secure advances, and some days later, having got them back from the Bank on a false representation, they filled in Hepworth's name as transferee, left the documents with the Railroad Company's agents, getting from them a receipt which stated that the new certificates would be ready on the 20th December, and caused Hepworth's name to be registered as owner. Thomas & Co. then delivered the receipt to the Bank, who kept it until February, when having learned that one of the firm of Thomas & Co. had absconded, the Bank sent it to the agents, who without inquiry handed to the bank clerk the new certificates issued in Hepworth's name.

The Bank then brought an action against Hepworth claiming a title to the shares, and that he might be ordered to execute the transfers indorsed on the new certificates and to assist in procuring registration in the name of the Bank; and the defendant counterclaimed for delivery to him of the new certificates. On behalf of the Bank it was contended that the original certificates with blank transfers, although not strictly negotiable instruments, were "negotiable by estoppel"; that the effect of their mere delivery by a seller, however defective his title, to a bonâ fide purchaser operated as a legal as well as equitable transfer of the shares, and that every prior holder was estopped from denying the title of such a purchaser.

Mr. Justice Chitty, however, held[3] that Hepworth had obtained the legal title to the shares in good faith and for value; that there was nothing which estopped him from asserting his title, and that the new certificates must be delivered to him. There was on the face of these certificates "an engagement that the shares thereby represented are transferable only on the surrender and cancellation

[1] (1887), 36 Ch. D. 36. [2] As to this form, see *ante*, pp. 104–105, 135.
[3] See 36 Ch. D. at 53-54.

" of the certificate; and the printed form on the back (which is issued by the Company) shows that a complete transfer is a transfer on the books of the Company, that is, by registration. Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having regard to the practice proved, and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the bonâ fide holder for value of the certificates[1] for the time being an authority to fill in the name of the transferee and is estopped from denying such authority." But the estoppel goes no further. If the Bank had inserted its own name as transferee in the blank transfers indorsed on the old certificates, the case would have stood differently; the defendant's name would not have been put on the register.[2] It was unnecessary to decide whether the Bank was a bonâ fide purchaser for value without notice.

Williams v. Colonial Bank[3] is another case arising out of the fraud of the same broker. There Williams was the registered owner, and held certificates showing him to be the owner, of shares in an American Railroad Company—the certificates being in the common form and not requiring to be transferred by deed.[4] Williams having died, his executors signed their names as executors on the indorsed transfers leaving blanks for the transferee and attorney, and sent them to Thomas & Co. for the purpose of getting the shares registered in the executors' names. One of these brokers fraudulently pledged the certificates with the defendant Bank as security for advances, and the brokers having become bankrupt, the executors claimed the certificates from the Bank.

In the action, it was proved that such certificates were usually signed by executors when they desired the shares to be registered in their own names; and, therefore, certificates so signed might be in the hands of brokers *either* (*a*) to complete the title of the executors, *or* (*b*) to effect a transfer; that the Company required the signatures of executors to be attested by a consul and accompanied by an official extract of the will; and that on the Stock Exchanges of New York and London certificates not complying with

[1] If by " bonâ fide holder of the certificates " is meant " the person entitled to the certificates," Lindley, L. J., considers that this statement is correct; but that if it is meant to include anybody else, it goes further than is warranted: see *Williams* v. *Colonial Bank* (1888), 38 Ch. D. at 407.

[2] See as to this point, *ante*, pp. 134, 135.

[3] (1888), 38 Ch. D. 388.

[4] As to this form, see *ante*, pp. 104–105, 135.

these requirements (as in the present case) were not regarded as in order.

It was argued for the Bank that the executors were estopped from setting up their own title against bonâ fide holders for value, but the Court of Appeal held that there was no such estoppel. Lord Justice Lindley said:[1] "I understand this document as representing in truth that the person entitled to the certificate by transfer, *not* the mere holder, *not* the thief, *not* the person taking from him even bonâ fide for value without notice, but whoever acquires a title to the certificate, is entitled to fill up the blanks and get registered as the holder."

On appeal to the House of Lords,[2] this decision was upheld. It was pointed out that the certificates conveyed no representation to persons transacting business with the broker that he had authority to sell or pledge, or to do more than cause the executors' names to be substituted for that of the deceased in the register of shareholders; since the mere signature as executors did not disclose which of those two things was intended. The representation made by those documents was merely this:—"I tell you—the Bank—I have been entrusted with these certificates for only one of two purposes—either to sell or to get the names of the owners of them registered in the books of the Company—but I will not explain which."[3] An ambiguous document of that kind cannot raise an estoppel. The signature of executors is in itself sufficient notice to cast upon the Bank the duty of inquiring into the extent of the broker's authority.[4] Moreover, the documents not being *in order* was an additional reason to put the Bank upon inquiry, and to prevent an estoppel being raised in its favour, since it had thus obtained the transfers not in the usual course of business.

Both Lord Watson and Lord Herschell expressed a decided opinion that if the transfers in this case had been signed and delivered to the brokers by *the registered owner*, (instead of by the executors of a deceased owner) the Bank would have obtained a good title, which he would have been estopped from disputing.[5]

Estoppel of Company by its Certificates.

Let us now direct our attention more especially to estoppel as affecting companies, and inquire first what is the effect of paying or advancing money on the faith of a certificate issued by a company, representing that the holder therein named is entitled either

[1] 38 Ch. D. at 406.

[2] *Colonial Bank* v. *Cady and Williams* (1890), 15 A.C. 267.

[3] See *per* Lord Halsbury, L.C., *ibid.* at 274.

[4] See *per* Lord Watson, *ibid.* at 280.

[5] *Ibid.* at 278, 285; *cf. ante*, p. 135.

to the shares or to the amount of debenture stock therein mentioned.

Let us suppose that a person purchases shares on the faith of a share certificate issued by the Company, representing that his transferor is the registered owner. If the Company afterwards refuses to register him, or, having registered him, refuses to treat him as a shareholder, on the ground that his transferor had no title to the shares, he can recover damages from the Company, which is estopped from denying the truth of the representation made by the certificate.[1] Again, suppose that a person advances money on the faith of a share certificate issued by the Company, representing that he is the registered owner, and that the shares are fully paid up. If the Company is afterwards wound up, and the liquidator places him on the list of contributories, on the ground that the shares were not in fact fully paid up, he is entitled to have his name removed from the list, the liquidator being (as the Company would have been) estopped from denying that the shares were fully paid up.[2]

But suppose that a Company, having power to issue debenture stock up to a certain amount, has issued certificates in respect of debenture stock in excess of that amount, and a person has paid or advanced money on the faith of such a certificate. The issue of debenture stock in excess of the Company's borrowing power is clearly an act *ultra vires*.[3] If the Company decline to recognise the holder's title, on the ground that it had no power to issue the stock, and be sued, can it be estopped by its certificate from denying that the holder is entitled to the debenture stock? This raises a point of great difficulty, and one not free from doubt. Conflicting opinions have been expressed on it, and it does not appear to have been directly decided, but it is submitted that in such a case the Company would be estopped.[4]

It has been said that such a certificate cannot raise an estoppel,

[1] *Tomkinson* v. *Balkis Consol. Co.* (1891) 2 Q.B. 614, C.A.; aff. H.L. (1893) A.C. 396; set out *post*, pp. 165, 166; Re *Bahia & San Francisco Ry.* (1868), L.R. 3 Q.B. 584; set out *ante*, p. 148.

[2] *Bloomenthal* v. *Ford* (1897) A.C. 156, H.L.; set out *post*, p. 163.

[3] *Fountaine* v. *Carmarthen Ry.* (1868), L.R. 5 Eq. 316. See *ante*, p. 110.

[4] In the cases, however, of *Weeks* v. *Propert* (1873), L.R. 8 C.P. 427, 436, 439; and *Firbank* v. *Humphreys* (1886), 18 Q.B.D. 54, 59, 61, C.A., directors of the companies were held personally liable in damages for breach of warranty of authority to issue valid debentures or debenture stock, on the ground that the plaintiff had no remedy against the company. But it seems doubtful whether the Courts were not contemplating the absence only of a remedy against the company to compel them to place the plaintiff in the position of a debenture holder—not the absence of *any* remedy against the company, such as the right of a plaintiff relying upon an estoppel to be compensated in damages for loss occasioned by reason of misrepresentation. See the argument in the text, *infra*.

on the ground that a company cannot be estopped from denying that it has done something which it had no power to do.[1] It is not, however, contended that the Company can be compelled specifically to make good its representation that the holder was entitled to so much debenture stock by registering the actual stock in his name, but the question is whether for failing to make that representation good it cannot be compelled to pay as damages the loss occasioned thereby. The precise representation made was that the holder named was entitled to so much debenture stock, and it is conceived that the Company will be estopped from showing that it was untrue. The other party having believed the representation to be true and acted on the belief induced by it, the company cannot, it should seem, be heard to say: "If you had made further inquiry, you would have learned that the statement was untrue.[2]

It is, indeed, open to argument that as the Company itself had no authority to make an over-issue, the directors had no authority to issue such a certificate so as to bind the Company; and, therefore, the representation made by the certificate, being wholly unauthorized, was not in fact a representation by the Company at all; and that the only remedy of a person who has suffered loss by relying upon it is an action for damages against the directors personally for breach of warranty of authority.[3] On the other hand, it may be said that a Company, unlike an individual, cannot act except through its duly constituted agents; that if a certificate is actually signed by the requisite number of officers of the Company, and the seal affixed with their authority, a member of the public, in the case supposed, has no means of knowing that they are exceeding their authority; and that it would paralyze the dealings in such certificates if it were open to the Company to dispute the representations which the certificates make.[4]

(a) Issue of Certificate procured through Fraud.

An instructive illustration of estoppel is afforded by the case of *Simm v. Anglo-American Telegraph Co.*[5] In that case Burge

[1] See Lindley on Comps. 5th ed. 485; 6th ed. I, 671; and Brice on Ultra Vires, 3rd ed. 145; and the dicta there referred to of Bowen and Fry, LL. JJ., in *British Mutual Bank* v. *Charnwood Forest Ry.* (1887), 18 Q.B.D. at 718, 719.

[2] It is submitted that the reasoning of the Law Lords in *Burkinshaw* v. *Nicolls* (1878), 3 A.C. 1004, at 1017, 1021, 1026-1027; *Balkis Consol. Co.* v. *Tomkinson* (1893) A.C. 396, at 407, 410, 415; and *Bloomenthal* v. *Ford* (1897) A.C. 156, at 162, 168-170, is applicable to the case supposed. This appears to be the view taken by Mr. Justice Buckley in his work on the Comps. Acts, 7th ed. 16.

[3] See n. [4], *ante*, p. 159.

[4] See the judgments in the H.L. referred to in n. [2], *supra*

[5] (1879), 5 Q.B.D. 188, C.A.; 49 L.J., Q.B. 392.

bought some stock in the defendant Company, and received a transfer which purported to be signed by Coates, a stockholder, but which was in fact a forgery. Burge sent this transfer to the Company, who, after making the usual enquiries, registered it. Burge then transferred the stock to Simm, the secretary of the National Bank, and the Company registered this transfer and issued a certificate to Simm, who held the stock as trustee for Burge, subject to any lien the Bank might have on it for advances to him. The Bank made advances to Burge on that security, but these advances had been repaid before the action was brought. The Company having discovered the forgery, refused to acknowledge Simm as a stockholder, or to pay him any dividends.

In an action by Simm and Burge against the Company to recover the purchase money and dividends, as damages for wrongful refusal to recognize Simm as the owner, it was contended on their behalf: 1. that Simm as trustee for the Bank had under the circumstances, as against the Company, acquired a title to the stock by estoppel; and 2, that it was the defendants' duty to keep a correct register, and, having entered Simm on the register, they could not afterwards refuse to acknowledge his right to the stock. The Court of Appeal, however, gave judgment for the Company, based on the following reasons:—(*a*) as regards Simm, because, although he could have recovered damages on the ground of estoppel, if damage had accrued to the Bank, yet, as the advances had been paid off, that ground failed; and (*b*) as regards Burge, because no estoppel existed in his favour, as the loss sustained by him had arisen from his having accepted as genuine a forged transfer, and not from relying upon any representation made to him by the Company.[1] Moreover, he had by producing to the Company a forged transfer himself induced them to insert the name of his nominee as owner.

In re *Ottos Kopje Diamond Mines*,[2] Goode bought from Gardner on the 6th April some shares upon the faith of a share certificate issued by the Company certifying that Gardner was the registered owner, and on that day Goode tendered to the Company the certificate and a duly executed transfer from Gardner to himself; but the Company, having learned on the previous day that this certificate had been issued through their secretary's fraud, refused to register the transfer. In an action by Goode against the Company,[3] claiming as damages the value of the shares on the 6th April

[1] *Cf.* Re *Ottos Kopje Diamond Mines* (1893), 1 Ch. 618, C.A.; and *Dixon* v. *Kennaway* (1900) 1 Ch. 833; both set out *infra*; in both of which cases the plaintiff having been *damnified* by relying on a certificate issued by the fraud of their secretary the company was estopped.

[2] (1893) 1 Ch. 618, C.A.

[3] The motion was so treated by consent; *ibid.* 622.

(since which date it had fallen), it was held that the improper refusal to register afforded the plaintiff a good cause of action, for the Company was estopped from disputing Gardner's title; and that the true measure of damages was the value of the shares on the 6th April; for, although the directors were entitled to a reasonable time to consider a transfer before registering it, they had in fact not taken time to consider, but had instantly refused.

In *Dixon v. Kennaway*,[1] the plaintiff had purchased shares through Liddell, a broker, who was also secretary of the Company, and she had obtained a certificate which through Liddell's fraud had been duly signed and sealed, he knowing that the shares specified belonged to another. In an action against the Company for damages, it was proved that before obtaining the certificate she had paid her money to Liddell, who was now bankrupt, and that she still held the shares; and it was argued for the defendant Company that, as she had not disposed of her shares, she had not suffered loss by relying on the certificate, and therefore, on the principle laid down in *Simm v. Anglo-American Telegraph Co.*,[2] no estoppel existed in her favour. It was held, however, that as she had been put to rest by the certificate until she could no longer recover against Liddell, she had relied on it to her detriment, and the Company were estopped. If she could have recovered nothing from Liddell at any time after receiving the certificate and had therefore suffered nothing by the delay, she was not entitled to recover damages from the Company, but the onus of proving this lay on the Company, and such proof they had not given.

(b) Certificate representing Shares as Fully Paid Up.

In *Burkinshaw v. Nicolls*,[3] shares in a limited Company were issued as fully paid up, by virtue of a contract not registered as required by the Companies Act, 1867,[4] and certificates of these shares as fully paid up. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid up on the faith of the certificates. The Company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid. But it was held that, as against a transferee who took the shares without notice that they

[1] (1900) 1 Ch. 833, *coram* Farwell, J.

[2] (1879), 5 Q.B.D. 188, C.A., *ante*, p. 160.

[3] (1878), 3 A.C. 1004; affg. S.C. in C.A. *sub nom.* Re *British Farmers,' etc., Co.* 7 Ch. D. 533.

[4] S. 25. See now ss. 7, 18, 19, and 33 of the Comps. Act, 1900.

had not been paid up in cash, the Company was estopped by the certificates from saying they had not been so paid up, and that the official liquidator was in the same position.

In *Bloomenthal v. Ford*,[1] Bloomenthal lent money to a limited Company, taking its acceptance for the amount, upon the terms that he should have as collateral security 10,000 fully paid-up £1 shares, and the Company gave him certificates, which stated that he was the registered holder of the shares and that the full amount on them had been paid. No money had in fact been paid upon the shares, which were issued from the Company direct to him, but he did not know this, and believed the representation that they were fully paid shares. An order having been made to wind up the Company, Bloomenthal was placed on the list of contributories.

Bloomenthal's application to strike his name off the list, was in the first instance refused, and the Court of Appeal upheld this refusal on the ground that he must have known that he was getting the shares direct from the Company, and that as he had paid nothing on them they could not be fully paid up; that he was therefore not a bonâ fide purchaser for value *without notice*, and for that reason could not rely on the certificates as an estoppel.

The House of Lords, however, reversed this decision, and held that it was erroneous to say that the shares *could* not have been fully paid up, although they were in the possession and control of the Company—for example, they might have been shares allotted to the original vendors who allowed them to be used for raising a loan; and that the question whether the applicant was a purchaser for value without notice had nothing to do with estoppel. Where an unequivocal statement of a particular fact is made by A. to B., A. cannot get rid of the estoppel which arises from B. acting upon it by saying that if B. had reflected he would have come to see that it could not be true. If B. had notice of some fact, it may be a circumstance from which the inference may be drawn that he did not believe what he professes to have believed. Of course, if B. did not believe A.'s statement, and did not act on the belief induced by it, there is no estoppel; but supposing he did believe it, and did act on the belief induced by it, there is an estoppel, which A. cannot get rid of by saying: "If you had thought more about it, you would have seen it was not true. You ought not to have believed me."[2]

Their Lordships consequently held that, since the Company had obtained the loan by a representation that the shares were fully

[1] (1897) A.C. 156, revg. C.A. (1896) 2 Ch. 525.

[2] See *per* Lord Halsbury, L.C., (1897) A.C. at 162-164, and *per* Lord Herschell, at 166-170.

paid, which Bloomenthal believed and acted upon, the Company and the liquidator were estopped from alleging that the shares were not fully paid, and that Bloomenthal was entitled to have his name removed from the list of contributories.

Certification.

Several cases have arisen in which it has been contended that a company is estopped by what is known as a *certification* issued by their secretary.

A *certification* is a statement written on the margin of a transfer of shares representing that the certificate for the shares has been lodged with the company, and signed by the secretary below the name of the company.

The following is a common form:—

"Certificate lodged.

"The X. Company Limited. [*Affixed by rubber stamp.*]

(Signed) "John Smith, Secretary."

The practice of giving certifications has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares where the seller's certificate does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but produces his certificate and the transfer to an officer of the company, and he certificates the transfer; and buyers and their brokers act on the faith of this certification.[1]

A certification at most only amounts to a representation that the documents mentioned in the transfer have been lodged *apparently in order*, and showing a *primâ facie* title in the transferor to transfer the shares; it does not warrant his title nor the validity of the documents. If, then, a certification is given, the company is not estopped from showing that the transferor had no title, or that the documents are invalid.[2]

Moreover, the secretary of a company is not authorized to do more than to give a certification in respect of certificates actually lodged in the office; and if he gives a certification when the certificates have in fact not been lodged, the company is not estopped from showing that the certificates were not in fact lodged.[3]

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[1] *Bishop* v. *Balkis Consol. Co.* (1890), 25 Q.B.D. 512, at 519, C.A.

[2] *Ibid.*

[3] *Whitechurch* v. *Cavanagh* (1902), A.C. 117, H.L. revg. C.A. This decision appears to overrule that in *McKay's Case* (1896) 2 Ch. 757.

The duties of a company's secretary are of a limited and a humble character. He is a mere servant, and no one can assume that he has authority to represent anything at all.[1]

Nor has the managing director of a company, to whom its commercial business is entrusted, authority to bind the company by joining in a certification, for the transfer of its shares is no part of its "commercial business."[2]

It is necessary to bear in mind that there is a marked difference between a *certification* and a *certificate.* A certificate is under the seal of the company, and is made by statute *primâ facie* evidence of title;[3] and the issue of a certificate will, as we have seen, frequently raise an estoppel against the company.

This difference is well illustrated by the two cases of *Bishop v. Balkis Consolidated Company*,[4] and *Tomkinson v. Balkis Consolidated Company*,[5] both of them arising out of the fraud of one Powter. Powter, the registered owner of many shares in the defendant Company, transferred 5,000 of them to purchasers, who became registered as the owners and received a certificate for these shares, a note of the transfer being indorsed on Powter's original certificate which had been lodged with the Company.

In *Bishop's Case*, Powter afterwards purported to transfer a portion of the same 5,000 shares to another purchaser, who again sold and executed a transfer of them to Bishop. Both of these latter transfers were certificated by the secretary, and on the faith of the certificated transfer to himself Bishop paid the price of the shares, and afterwards obtained new certificates for them; but the Company having discovered Powter's fraud, refused to register Bishop. In an action against the Company to recover the value of the shares, it was held that the Company were not estopped by the *certification* from impugning the plaintiff's title on the ground of the invalidity of the transfer to his transferor; nor were they in this case estopped by the *certificates*, because Bishop had not altered his position to his detriment by reason of their issue, since

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[1] *Per* Lord Macnaghten, *ibid.* (1902) A.C. at 124, citing Lord Esher, M.R., in *Barnet* v. *South London Tram. Co.* (1887), 18 Q.B.D. at 817. See also *British Mutual Bank* v. *Charnwood Forest Ry.* (1887), 18 Q.B.D. 714, C.A., revg. Q.B.D., where the defendant Co. were held not to be liable for the false answers fraudulently given by their secretary for his own benefit to the plaintiffs that certain debenture stock had been properly issued by the Co., and that certain transfers thereof were valid.

[2] *Whitechurch* v. *Cavanagh* (1902), A.C. at 131-132, 133, 143.

[3] See, *ante*, pp. 103, 105.

[4] (1890) 25 Q.B.D. 77, and in C.A. 512.

[5] (1891) 2 Q.B. 614, C.A.; aff. in H.L. *sub nom. Balkis Consol. Co.* v. *Tomkinson* (1893) A.C. 396.

he had before receiving them paid his money on the strength of the certification only.[1]

In *Tomkinson's Case*, Powter in like manner purported to transfer another portion—1,000—of the same 5,000 shares, and got the secretary of the Company to put a certification on the transfer, which Powter then deposited as security for an advance with Tomkinson, a stockbroker, who lodged it with the Company for registration. The Company afterwards issued a certificate duly signed and sealed to Tomkinson, certifying that he was the proprietor of the 1,000 shares. Tomkinson then, being entitled to reimburse himself by realizing, sold the shares and lodged with the Company his certificate, together with transfers in favour of the various purchasers, in order that they might be certified. This was done, and the transfers, certified by the secretary, were returned to Tomkinson and handed to the purchasers. The Company, having then discovered Powter's fraud, refused to register the purchasers from Tomkinson, who was consequently obliged to purchase other shares for his customers at a higher price.

In an action by Tomkinson against the Company to recover the amount so paid by him, it was held that the Company were estopped by their certificate from denying that he was the proprietor of the shares, and he was held to be entitled to recover from the Company the damages which he had in fact sustained owing to their refusal to register the purchasers from him.

Good Faith.

It is quite clear that it is only when the transferee or pledgee of instruments, whether negotiable or not, has taken them in good faith, that he can in any case acquire a better title than his transferor or pledgor.

It is, therefore, of the first importance to ascertain what is meant by *good faith*. It would be of little use to attempt to define it. The circumstances of business transactions are of infinite variety, and every case must be decided on its own merits. Good or bad faith is a question of fact depending on the circumstances.

If a thing is done honestly, however negligently, it is deemed to be done in good faith.[2] If a man give value for a negotiable instrument, he will acquire a good title provided he took it honestly; and therefore his title will not be defeated by showing that he was

[1] 25 Q.B.D. at 86. This latter point was not argued on the appeal. *Cf. Dixon* v. *Kennaway* (1900) 1 Ch. 833, *ante*, p. 162, where the plaintiff was held to have relied on the certificate to her detriment.

[2] See as to bill transactions, B. of E. Act, 1882, s. 90.

careless, or negligent, or foolish, in not suspecting that there was something wrong about it.[1]

Accordingly, in *Venables v. Baring*,[2] where some negotiable bonds payable to bearer of an American Railroad Company were stolen in 1883 from the defendants, Messrs. Barings, who were the London agents of the Company, and who immediately advertised the loss of the bonds, stating their numbers, both publicly and by notice sent to bankers in London and Paris, and in 1891 the agents in Paris of the plaintiff, who was a banker in London and Paris, advanced money in good faith to a customer on the security of some of the stolen bonds, it was held that even if the plaintiff's agents had been negligent in not observing that these bonds bore the numbers advertised, yet as they took them in good faith, the plaintiff had a good title to them.

But carelessness, or negligence, or folly, when taken in connection with the surrounding circumstances, may be evidence of bad faith, and if the tribunal which has to decide the question comes to the conclusion that the person taking the security did not make an honest blunder, but had a suspicion that there was something wrong —that he was affected with notice of something fraudulent in the transaction—then he will be held not to have acted in good faith.[3]

If, therefore, a banker makes advances to a customer on the security of negotiable instruments, or of instruments not negotiable but of which the banker takes a legal transfer, the customer not being entitled to pledge them for the amount advanced, the extent of the banker's right to retain the instruments or their proceeds will depend upon whether he took them in good faith. If the customer is known to be a money dealer or stockbroker or other agent, the question whether the banker took the securities in good faith, or, on the other hand, whether he had reason to suspect that his customer had a limited authority only, is sometimes very difficult to determine, as will be seen by a careful comparison of the two important decisions of the House of Lords in *Lord Sheffield v. London Joint Stock Bank*, in 1888[4] and the *London Joint Stock Bank v. Simmons* in 1892.[5]

[1] *Raphael* v. *Bank of England* (1855), 17 Common Bench Rep. 161; *per* Byles, J., in *Swan* v. *North British Australas. Co.* (1863), 2 Hurlstone and Coltman's Rep. at 184-185: *per* Lord Herschell in *London J. S. Bank* v. *Simmons* (1892) A.C. at pp. 218-219, 223.

[2] (1892) 3 Ch. 527.

[3] See *per* Baggallay, L.J., in Re *Gomersall* (1875), 1 Ch. D. at 146; *per* Lord Blackburn in *Jones* v. *Gordon* (1877), 2 A.C. at 628-629. *Cf.* as to constructive notice, *per* Wigram, V.-C., in *Jones* v. *Smith* (1841), 1 Hare at 55-56; and *per* Lord Herschell in *London J. S. Bank* v. *Simmons* (1892) A.C. at 221, 223, cited *post*, pp. 171-172, 173.

[4] 13 A.C. 333; in C.A. (1886), *sub nom. Easton* v. *London J. S. Bank*, 34 Ch. D. 95: and set out *infra*.

[5] (1892) A.C. 201, set out *post*, p. 172.

In *Sheffield v. London Joint Stock Bank*,[1] Lord Sheffield gave to Easton, with whom he was associated in a financial adventure, certain certificates of railway stock, with transfers executed in blank, and bonds of foreign companies payable to bearer, for the purpose of obtaining from Mozley, a money dealer in the city of London (whose business was to carry out such transactions on a very large scale in conjunction with some of the principal Joint Stock Banks), an advance of £26,000, by depositing with him those securities. Easton agreed with Mozley that the advance should be made, and that during the continuance of the loan the current market price of the securities should represent a value of 20 per cent. above the loan, and that if it became less, Easton should provide additional security or pay off a portion; and that on default Mozley might realize the securities for the purpose of repaying himself. Easton was aware that Mozley's course of business was to deposit securities with banks to cover his own indebtedness to them, but he did not communicate this fact to Lord Sheffield. Mozley, in accordance with his usual course of dealing, deposited with three Banks these securities, together with securities of other customers, *en bloc* to cover large loans to himself, amounting to £141,500, £100,000 and £70,000 respectively. The transfers of Lord Sheffield's stock were filled in with the names of nominees of the Banks, and duly registered in the books of the Railway Company who sent notice of the transfers to Lord Sheffield. Mozley also gave each of the Banks a memorandum of deposit,[2] purporting to charge all the securities deposited with his indebtedness, and authorizing the Bank to realize them if during the continuance of the loan the securities should not represent a value of 10 per cent. above the loan.

The Banks were well aware of the nature of Mozley's business; that he borrowed from them and lent at a higher rate of interest to his customers, who were principally members of the Stock Exchange; that the bulk of the securities deposited were those of his customers, and that they were exchanged from time to time to suit the customer's convenience. On every settling day the Banks permitted him to withdraw the securities mentioned in a list sent in by him the previous day, on his undertaking to restore securities of equal value by the end of the day, although they frequently allowed him some days' indulgence. In his correspondence with the Banks, he referred to lists of securities as coming from his "clients"; to a client pressing him for delivery of particular stock, as it was sold; and to his "customer," or his "borrower" having omitted

[1] (1888), 13 A.C. 333, H.L. revg. C.A.; see S.C. *sub nom. Easton* v. *London J. S. Bank* (1886), 34 Ch. D. 95.

[2] These were similar to the form printed *ante*, p. 92.

to exchange securities deposited; and in some cases he deposited at the Banks, together with the securities, the deposit notes given him by his own customers.[1]

In May, 1883, Mozley's affairs went into liquidation, and the Banks sold some of Lord Sheffield's securities, and claimed to hold the proceeds and the unsold remainder as security for all the debt due to them from Mozley.

Easton and Lord Sheffield then brought an action against the Banks, claiming a declaration that the plaintiffs were entitled upon Mozley's liquidation to redeem Lord Sheffield's securities on payment of the sums due from the plaintiffs to Mozley, and claiming damages for the conversion of those sold.

At the trial, besides the facts above stated, the evidence disclosed that it was customary for money dealers in Mozley's position to get large advances from certain banks in the city of London in the same manner as he had done, but although this was the general course of dealing and practice as between money dealers and those banks, it was held that "there was no such general custom proved as would bind any one dealing with a money dealer, unless it was shown that he had notice of the practice, and he was proved to have dealt with him on the footing of that practice."[2] And it was proved that Lord Sheffield had no knowledge of this practice, nor was he aware, before Mozley's liquidation, that his securities had been pledged for more than £26,000.

Upon this state of facts, Mr. Justice Pearson held that Lord Sheffield had entrusted Easton with the securities to deal with them as if they were his own, and had treated Easton as his debtor; that Easton must be treated as principal in obtaining the loan from Mozley, and not as Lord Sheffield's agent, or as having any limited authority whatever with regard to the securities; that, quite independently of any usage, Easton had assented to Mozley's mode of dealing with the securities by depositing them with the Banks to cover the entire amount of his indebtedness from time to time, and therefore he could not complain of what Mozley had done, and Lord Sheffield could have no greater rights than Easton had; and that the action must be dismissed.[3]

The Court of Appeal, while not agreeing with this view of the facts, being of opinion that Easton's authority was limited by Lord Sheffield to pledging the securities, yet held that Lord Sheffield was estopped from objecting to the Banks' title to the securities, and

[1] These facts are taken from the Cases and Appendix lodged in the House of Lords.

[2] See *per* Cotton, L.J., 34 Ch. D. at 106; app. by Lord Watson, 13 A.C. at 343.

[3] 55 Law Times Rep. 678, at 680-682.

that the Banks, having the legal title in the stock and having obtained the bonds in their ordinary course of dealing with Mozley without any reason for suspecting that he was exceeding his authority, were purchasers for value without notice, and were entitled to hold them as security for the whole amount of his debt.[1]

The House of Lords,[2] however, reversed this decision, and held that the Banks were not purchasers for value *without notice;* that under the circumstances they ought to have inquired into the extent of Mozley's authority; and that, upon payment to the Banks of the money advanced by Mozley to Easton with interest, Lord Sheffield was entitled to redeem the securities unsold and to receive the value of those sold.[3]

Their Lordships, instead of agreeing with the Court of Appeal in accepting as sufficient the explanation of the Bank officials that they believed Mozley had full power to deal with all the securities, drew from the evidence the conclusion that the Banks knew that the bulk of the securities lodged by Mozley were those of his customers, and that he was not acting by right of ownership. The Banks were therefore not justified in assuming without inquiry that Mozley had the owner's authority to pledge the securities for their full value against the advances which they made to him. It was immaterial whether the securities were negotiable or not; for the holder of a negotiable security who has reason to believe that it does not belong to his transferor or pledgor does not get a good title merely by virtue of its negotiability. No general custom of trade had been proved that money lenders dealt with their customers on the footing of mortgaging *en bloc* the securities of various customers to secure their own debt; and a course of dealing (such as had been proved) between a particular money lender and a bank, and not between him and his customer, could not affect the customer unless he was aware of its existence.

This decision of the House of Lords created something approaching to consternation in the banking world, and the effect of it was very generally misunderstood in the legal profession, and was not correctly appreciated even by learned Judges of the Court of Appeal,[4] until four years later the House of Lords in the *London Joint Stock Bank v. Simmons*[5] explained that the decision had turned entirely on the peculiar circumstances of the case, and laid down no new principle of law whatever.

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[1] (1886), 34 Ch. D. 95; 55 Law Times Rep. 678.

[2] Lords Halsbury, L.C., Watson, Bramwell, and Macnaghten.

[3] (1888), 13 A.C. 333; 58 Law Times Rep. 735.

[4] See *per* Lord Watson, (1892) A.C. at 214; and Lord Macnaghten, *ibid.* at 225.

[5] Lords Halsbury, L.C., Watson, Herschell, Macnaghten, and Field. (1892) A.C. 201.

It was explained[1] that in *Lord Sheffield's Case* the House had been satisfied upon the evidence that the Banks had such notice and knowledge of the limited title of their pledgor as made it inconsistent with fair mercantile dealing that they should retain Lord Sheffield's securities for any sum beyond the extent of the pledgor's interest, and to claim to do so was therefore a want of good faith.

Lord Herschell (who had not been present in *Lord Sheffield's Case*) examined[2] that decision at considerable length, and in stating what he understood to be the grounds of the judgment, which had not "questioned, much less purported to overrule, any prior authority," he pointed out that Mozley was himself a pledgee of the securities, and as such had an undoubted right to repledge them. He in fact repledged them as security for a sum exceeding that for which he held them in pledge, and the question was whether the Banks could insist on retaining them for the larger, or only for the smaller, sum. Their Lordships had considered that the Banks had reason to believe that in pledging them for his entire indebtedness Mozley was exceeding any authority he had to deal with them, and that the circumstances put the Bank upon inquiry.

Now when a person is put on inquiry he is in law deemed to know the facts which he would have ascertained if he had made inquiry. By abstaining from so doing, his position is made neither better nor worse than if he had made inquiry and had received the answer. Supposing Mozley had been questioned as to his right to deal with the securities, and had given a satisfactory assurance, and there had been no reason to doubt his honesty, their Lordships' decision must have been in favour of the Banks. But as the case stood, their Lordships must have entertained the opinion that there was no ground for supposing that, if Mozley had been asked the question, he would not have stated the facts truly, and have admitted that his authority was limited. It was therefore contrary to good faith for the Banks to retain the securities for anything beyond the sum for which he could legitimately pledge them. It will thus be seen that the judgment turned entirely upon the view taken of the facts, and left untouched "the established rule of law, that a person taking a negotiable instrument in good faith and for value obtains a title valid against all the world."

As to being put upon inquiry, Lord Herschell said he would "be very sorry to see the doctrine of constructive notice[3] introduced into the law of negotiable instruments. But regard to the facts of

[1] By Lord Watson, *ibid.* at 214, and Lord Macnaghten at 225-226.

[2] (1892) A.C. at 219-221.

[3] As to the doctrine of constructive notice, see the able exposition of the law by Wigram, V.-C., in *Jones* v. *Smith* (1841), 1 Hare, at 55–56.

which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry."

In order to appreciate the true effect of the decision in *Lord Sheffield's Case*[1] it is necessary that the facts should be carefully distinguished from those that arose in *Simmons v. London Joint Stock Bank*,[2] especially as the House of Lords held that the Court of Appeal[3] was in error in deciding that the latter case was governed by the decision in the former.

In *Simmons v. London Joint Stock Bank*,[2] the plaintiff having bought the bonds of a foreign company, payable to bearer and known as *Cedulas*, left them in the hands of Herapath, Delmar and Co., his stockbrokers, for safe custody. Delmar, one of the firm of brokers, sold them without the plaintiff's authority, and bought others of the same kind which he entered by their proper numbers in his books as the plaintiff's bonds, and pledged them together with securities of other customers with the defendant Bank to secure an advance of £6,000. The Bank had for many years been in the habit of making advances to Delmar's firm, which was of high standing on the Stock Exchange, as well as to many other stockbrokers and money dealers on the security of stocks, shares, and bonds, which were frequently changed at the fortnightly settlements. The Bank followed precisely the same course of dealing with both stockbrokers and money dealers, who when they brought such securities to pledge were asked no question as to the ownership, the Bank granting facilities for withdrawing such of the securities pledged as the customers might at any time require. Some of these customers were firms of stockbrokers in a very large way of business who were known to the Bank to lay themselves out for dealing in money and making advances—principally to other stockbrokers.[4] Delmar having absconded, the Bank sold the securities in discharge of his debt, and the plaintiff sued the Bank for the proceeds with interest.

The Court of Appeal,[5] held that the Bank was not a *bonâ fide* holder for value without notice, since the Bank knew that the bonds might very probably belong to one or more of Delmar's clients,

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[1] (1888), 13 A.C. 333.

[2] (1891), 1 Ch. 270, C.A.; rev. in H.L., *sub nom. London J. S. Bank* v. *Simmons* (1892), A. C. 201.

[3] Constituted of Lindley, Bowen and Fry, LL. JJ.

[4] Taken from evidence in Appendix lodged in the House of Lords.

[5] (1891) 1 Ch. at 294–295.

and did not honestly believe either that Delmar was the owner, or had the authority of the various owners to deposit their securities *en bloc* as cover for a lump sum advanced to himself, but, relying upon his honesty, the Bank made no inquiry as to his actual authority. The case was, therefore, in the opinion of the Lords Justices governed by *Lord Sheffield's Case*, and the judgment in favour of the plaintiff should be affirmed.

The House of Lords[1] reversed this decision on the ground that the facts were totally different from those proved or inferred in *Lord Sheffield's Case;* that there were in the present case no circumstances to create suspicion; and the Bank, having taken negotiable instruments for value and in good faith, was entitled to realize them and retain the proceeds.

In their Lordships' opinion, the Bank had no reason in the present case to know in what capacity Delmar became possessed of the bonds, or to suppose that he had only a limited authority, seeing that stockbrokers in the ordinary course of business are employed to sell or raise money upon their customers' securities. If he had authority to pledge the bonds to their full value, as the Bank appears to have honestly believed, it was immaterial to the owner whether they were so pledged alone or *en bloc* with others. The practice of pledging securities of various owners *en bloc*, which prevails among stockbrokers as among bill-brokers, has advantages for customers in general, though it may occasionally operate hardly on an individual.[2]

Lord Herschell observed[3] that "when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required." The law does not lay upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them. Of course, if there were anything to arouse suspicion or to lead to a doubt, and if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, there would then be an absence of good faith.

The result of these two decisions of the House of Lords, the importance of which to the mercantile community can hardly be overrated, appears to be that where a banker makes advances to a customer on the pledge of negotiable instruments, or of instruments

[1] (1892) A. C. 201.

[2] As pointed out in *Foster* v. *Pearson* (1835), 1 Crompton, Meeson and Roscoe's Rep. at 859, it may give facilities for raising money, because a great capitalist may be willing to advance money in this way who would not discount each particular bill.

[3] (1892) A. C. at 223.

not negotiable but of which the banker takes a legal transfer, as security for the whole amount of the customer's indebtedness to the banker, the right of the banker to hold them for that amount, or merely for a lesser amount, or for no amount at all, will depend upon whether the banker at the time of receiving the securities or of making the advance knew or had reason to know that the customer was an agent having *limited authority only*. Mere knowledge that the customer was an agent—*e.g.* a broker—does not make it incumbent on the banker to make further inquiry,[1] and therefore such knowledge will not prevent his retaining the securities for the whole amount of the customer's debt. But in case he has any reason to suspect that the customer is an agent with limited authority, then if he abstains from inquiry as to the extent of that authority, he cannot retain the securities as against the customer's principal for any greater amount than the customer could have done. If, however, he makes inquiry and receives a satisfactory assurance upon which he honestly relies,[2] he is then entitled to retain the securities, and (when given the power) to realize them and retain the proceeds, for the whole amount of his customer's indebtedness.

The distinction between the inferences drawn by the House of Lords in *Lord Sheffield's Case* and those drawn in *Simmons' Case* would seem in effect to depend upon the knowledge by the Banks of the nature of the business carried on by the money dealer in the former, and by the stockbrokers in the latter case. Securities pledged by a money dealer may be pledged almost exclusively for his customers in respect of advances made to them, and it may therefore well be that the bankers with whom he deals will have actual knowledge that his agency is of a limited character only. Ordinary stockbrokers, on the other hand, frequently have actual authority to sell or pledge,[3] and the banker may have no knowledge

[1] *Cf. per* North, J., in *Bentinck v. London J. S. Bank* (1893), 2 Ch. 120, at 138–139. On the same principle, if a stockbroker, in fraud of his principal, pays a cheque in to his account which is overdrawn, the mere fact that the banker knew him to be a stockbroker and believed the money to be in his hands as a broker acting for clients, does not put the banker on inquiry; and the principal cannot recover the money from the banker unless he can show that the latter had reason to suppose that the broker was not justified in paying in that particular amount: *Thomson* v. *Clydesdale Bank* (1893) A.C. 282, H.L.

[2] From a practical point of view there seems to be a good deal of force in the reply given by a bank manager when pressed in cross-examination upon his never questioning customers as to the ownership of securities deposited with him against advances:—"We should have merely affronted the good customer, and the fraudulent one would have said they were good."

[3] In the case of negotiable instruments authority to sell implies authority to pledge: see *per* Lord Herschell in *London J. S. Bank* v. *Simmons* (1892) A.C. at 217–218.

that in a particular case the broker's agency is limited. Moreover, in all *contango* transactions the broker is the absolute owner of the shares, and where he has advanced the money and the shares have been transferred to him, he is entitled to deal with them.[1] At the same time it is well known that enormous transactions are daily carried on by brokers precisely similar in character to those which were carried on by the money dealer in *Lord Sheffield's Case*,[2] and if the lending Bank are aware that a customer's transactions are of that character, they may, it would seem, be put on inquiry.

Contangoes.

In this connection it may be well to say something with regard to *contango* or *continuation* transactions which now form a very large proportion of the whole business on the Stock Exchange.[3]

Contango (which apparently is a word arbitrarily formed from *continue*) is the charge per share or per cent, which is paid by the buyer to the seller for postponing transfer to a future settling day. It is the opposite of *backwardation*, which is the percentage paid by the seller to the buyer for the privilege of keeping back delivery till a future settling day.[4]

To continue is a Stock Exchange term meaning to sell and to agree to rebuy the same amount of stock or shares at a future day at the same price and a sum for the accommodation.[5]

In these dealings a client directs a broker to buy shares or stock for which the client is not himself at the time finding the money to pay, and the broker, who provides the money, borrows it for the purpose. This is done sometimes by a pure and simple loan; but in a very large majority of cases, it is done by the broker finding the money on *contango*, and then what happens is this:—he is by the contract, not the mortgagee or pledgee, but the purchaser of the shares out and out, and they become his own property. The shares are not yet transferred to him; but, as between the client

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[1] See *Bentinck* v. *London J. S. Bank* (1893) 2 Ch. 120, and *contangoes* described *infra*.

[2] As to a class of brokers who are chiefly employed in such transactions, see *ante*, pp. 44–45.

[3] Stated by the Official Assignee of the Stock Exchange to amount to four-fifths, and by another witness to nineteen-twentieths, of the whole business, in their evidence in *Bentinck* v. *London J. S. Bank* (1893), 2 Ch. 120, at 125, 140.

[4] A Stock Exchange poet thus sings:

> "The Bear a good contango loves,
> The Bull a backwardation."

[5] *Per* C.A. in *Bongiovanni* v. *Société Générale* (1886), 54 L.T. 320.

and himself, he becomes the absolute owner of the property, subject, however, to an agreement made at the same time, that he is to re-sell to the client, not the identical shares, but a like amount of similar shares, usually on the next account day (although a later day may be fixed by arrangement) at a price larger than that for which he gave his client credit on the first occasion, in order to cover interest. The large amount of business done in this way affords ample ground upon which a banker may fairly come to the conclusion that shares or stocks held by brokers are within their absolute power, and therefore any doubt or suspicion which he might otherwise have entertained would be at once allayed by his knowledge of the course of business.[1]

Where a broker purchasing stock from a jobber makes an agreement with him to "continue," there are eventually three contracts made between them:—

1. The original purchase for the next settling day.

And then two further contracts:

2. To *sell* for the same settling day the same amount of stock as he has bought (which practically cancels the original purchase).

3. To *buy* at the same price as sold the same amount for the *subsequent* settling day.

If in such a case the broker performs his contract to rebuy (No. 3), he is entitled to receive the amount of stock originally sold to him (No. 1) afterwards resold by him (No. 2), and if it is delivered to him the transaction is closed. If it is not delivered, he is entitled to damages in respect of the loss he has sustained (if any) by not getting it.[2]

If, however, the broker makes default by not paying the purchase money, he is liable for breach of contract (No. 3). If the stock has gone up, the jobber will have been the gainer, and he could recover only nominal damages. If the stock has gone down, the jobber can recover as damages the difference between its market value at the time when the broker ought to have paid and the price which he agreed to pay.[3]

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[1] This is taken from the *résumé* of the evidence as to contango transactions given by North, J., in *Bentinck* v. *London J. S. Bank* (1893), 2 Ch. at 140–141.

[2] See *per* C.A. in *Bongiovanni* v. *Soc. Générale* (1886), 54 L.T. at 321.

[3] *Ibid.*

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The Factors Act, 1889.

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The Factors Act, 1889.

52 & 53 Vict., c. 45.

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Preliminary.

1. For the purposes of this Act— Definitions.

(1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

(3.) The expression "goods" shall include wares and merchandise:

(4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance, or of any pecuniary liability:

(6.) The expression "person" shall include any body of persons, corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of mercantile agent with respect to disposition of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent. Agreements through clerks, etc.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. Provisions as to consignors and consignees.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same. Disposition by seller remaining in possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. Disposition by buyer obtaining possession.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any Effect of transfer of documents on vendor's lien or right of stoppage *in transitu*.

vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Supplemental.

Mode of transferring documents.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

Saving for common law powers of agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Repeal.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Commencement.

15. This Act shall commence and come into operation on the first day of January One thousand eight hundred and ninety.

Extent of Act.

16. This Act shall not extend to Scotland.

Short title.

17. This Act may be cited as the Factors Act, 1889.

SCHEDULE.

ENACTMENTS REPEALED. Section 14.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4. c. 83 (1823) ...	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. 4. c. 94 (1825) ...	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39 (1842) ...	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c 39 (1877) ...	An Act to amend the Factors Acts.	The whole Act.

The Factors (Scotland) Act, 1890.

53 & 54 VICT., c. 40.

An Act to extend the Provisions of the Factors Act, 1889, to Scotland. [14th August, 1890.]

BE it enacted by, etc., as follows:

1. Subject to the following provisions, the Factors Act, 1889, shall apply to Scotland:— Application of 52 & 53 Vict. c. 45, to Scotland.

(1.) The expression "lien" shall mean and include right of retention; the expression "vendor's lien" shall mean and include any right of retention competent to the original owner or vendor; and the expression "set off" shall mean and include compensation.

(2.) In the application of section five of the recited Act, a sale, pledge, or other disposition of goods shall not be valid unless made for valuable consideration.

2. This Act may be cited as the Factors (Scotland) Act, 1890. Short title.

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